Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

FLUOR HANFORD, INC., AND
FLUOR FEDERAL SERVICES, INC.,

Petitioners,

v.

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, AND CHARLES CABLE,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Washington

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether respondents may circumvent the exclusive jurisdiction of the National Labor Relations Board over alleged unfair labor practices by filing in state court an ostensible state-law claim for wrongful discharge in violation of state public policy.

2. Whether respondents may circumvent the arbitration clause in their collective bargaining agreement by invoking a presumption *against* arbitration under the Federal Arbitration Act.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioners Fluor Federal Services, Inc., and Fluor Hanford, Inc., hereby state that they are wholly owned subsidiaries of Fluor, Inc., a publicly traded company.

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INTRODUCTION

This is a case about workers at a *federal* nuclear facility who are trying to circumvent an exclusive *federal* remedial scheme by pursuing an ostensible *state* claim in *state* court. Respondents are union members who were laid off from their jobs at a federal nuclear facility in Washington State. They claim that petitioners, federal contractors at the facility, wrongfully discharged them in retaliation for being (or supporting) whistleblowers on workplace-safety issues, in violation of state public policy. There is no question that respondents could have challenged their discharge by filing an unfair labor practice charge before the National Labor Relations Board, or pursuing a grievance in arbitration under their collective bargaining agreement. The question here is whether respondents can circumvent these remedies by pursuing an ostensible state-law claim in state court. Contrary to the decision below, they cannot.

The Washington Court of Appeals recognized that respondents' ostensible state-law claim was presumptively preempted by the National Labor Relations Act (NLRA), because it involves conduct at least arguably prohibited by that statute. But the court held that the claim fell within an exception to NLRA preemption for matters that "touch on interests deeply rooted in local feeling and responsibility"—even though state law does not regulate workplace safety at the federal nuclear facility, and respondents could have challenged the same conduct by filing an unfair labor practice charge with the NLRB. The court thereby allowed a narrow exception to swallow the rule, and exacerbated an existing conflict of authority on the exception's scope.

And even if respondents had a state-law claim that survived NLRA preemption, the Washington court also erred by refusing to send that claim to arbitration under the terms of the parties' collective bargaining agreement (CBA). Rather than

applying the ordinary presumption in *favor* of arbitration under the Federal Arbitration Act, the court applied a presumption *against* arbitration, holding that an arbitration clause in a CBA does not waive a judicial forum for employee claims unless the waiver is "clear and unmistakable." Once again, the court erred, and exacerbated an existing conflict of authority on the application of arbitration clauses in CBAs to employee claims.

The court below thus succeeded in flouting not one but two fundamental federal policies: (1) the policy favoring federal resolution of labor disputes, and (2) the policy favoring arbitration. Indeed, it is hard to imagine a more inappropriate context for the intrusion of state courts than a labor dispute over workplace safety at a federal nuclear facility. Because the Washington court erred, and exacerbated existing conflicts of authority on both questions presented, this Court's review is warranted.

OPINIONS BELOW

The Washington Court of Appeals' opinion is reported at 109 Wash. App. 347, 35 P.3d 389, and reprinted in the Appendix ("App.") at 1a-13a. The Washington Supreme Court's unpublished order denying the petition for discretionary review is reprinted at App. 14a-15a. The trial court's unpublished order granting petitioners' motion to dismiss in favor of arbitration and staying the proceedings pending appeal is reprinted at App. 16a-17a.

JURISDICTION

The Washington Supreme Court denied discretionary review on August 7, 2002. App. 15a. Justice O'Connor granted an extension of the time for filing this petition to and including December 4, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

Section 7 of the NLRA provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

Section 8 of the NLRA provides in pertinent part:

> It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title; . . . (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . .

29 U.S.C. § 158.

The Federal Arbitration Act provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

This case arises out of a series of layoffs at the federal nuclear facility in Hanford, Washington. Petitioners Fluor Hanford, Inc. and Fluor Federal Services, Inc. (collectively Fluor) are contractors at that facility. In that capacity, petitioners employed respondents, who are members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 598, as pipefitters. App. 3a. As union members, respondents were parties to a collective bargaining agreement (CBA) that covered every aspect of their employment at Hanford, and included (1) a guarantee that workers would not be laid off for refusing to work in unsafe conditions, and (2) a binding arbitration agreement. App. 3a.

After Fluor began working at the Hanford facility in 1996, it implemented a series of reductions in force that eliminated the jobs of 81 pipefitters, including all eleven respondents. App. 3a. Five of the respondents, however, allege that they were terminated for refusing to install an allegedly unsafe valve, and the other six allege that they were terminated for supporting the first five.

The union initially filed a grievance pursuant to the CBA protesting the layoffs of the first five workers, but then voluntarily withdrew it several months later. App. 3a. Respondents then filed complaints with the United States Department of Labor, alleging that Fluor had retaliated against them in violation of the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. § 5851, but again voluntarily withdrew those claims shortly thereafter. App. 3a-4a.

Respondents filed this lawsuit in Washington state court in August 1999, alleging that they had been terminated in violation of state public policy for being (or supporting)

whistleblowers. App. 4a.[1] Fluor removed the case to federal court as completely preempted under Section 301 of the Labor Relations Act (LMRA), 29 U.S.C. § 185. App. 4a. The district court (Shea, J., E.D. Wash.), however, held that respondents' claims were not preempted under the LMRA, and remanded to state court. App. 4a.

Back in state court, Fluor moved to dismiss respondents' claims in favor of arbitration under the CBA in light of this Court's decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). App. 4a-5a. The state trial court (Brown, J.) granted the motion to dismiss, but agreed to stay the proceedings pending appeal. App. 5a. Respondents appealed that decision to the Washington Court of Appeals.

The Court of Appeals reversed. App. 1a-13a. The court began by rejecting respondents' argument that the Federal Arbitration Act (FAA) does not apply at all to arbitration agreements contained in CBAs. App. 6a ("We conclude as a matter of law that the FAA is applicable to the CBA in the present case."). But the court then proceeded to apply a presumption *against* arbitration of employee claims under a CBA, holding that "an arbitration clause in a CBA will not waive an employee's right to a judicial forum unless such a waiver is *clear and unmistakable*." App. 6a (emphasis added). Applying this "clear and unmistakable" standard, the court concluded that the arbitration clause in this CBA did not specifically waive a judicial forum for employee claims of wrongful discharge in violation of state public policy. App. 6a-7a.

The court then addressed Fluor's alternative argument that dismissal of respondents' claim was warranted because that

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[1] Respondents also brought a state-law civil conspiracy claim, but that claim was dismissed below, and respondents did not appeal that dismissal. App. 4a.

claim was preempted by the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.* App. 10a-12a. The court acknowledged that "[u]sually the National Labor Relations Board (NLRB) is given *exclusive* jurisdiction over controversies even arguably involving unfair labor practices under the NLRA." App. 10a (emphasis added; citing, *inter alia*, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959)). Although the court acknowledged that "we find it at least arguable that [respondents] engaged in concerted activities for mutual aid and protection in the pursuit of their claim," the court held that respondents' claims fell within an exception to *Garmon* preemption for claims that "touch[] matters of clear local interest." App. 11a. According to the court, "Washington has a substantial interest in regulating discriminatory employment practices," App. 11a, and respondents' wrongful-discharge claim implicates "Washington's interest in protecting the health and safety of its workers and citizens," App. 12a.

After concluding that respondents' claim was subject neither to the exclusive jurisdiction of the NLRB nor the arbitration agreement in the CBA, the Washington Court of Appeals reversed the trial court's ruling and "remanded for trial." App. 13a. Petitioners unsuccessfully sought discretionary review of that decision by the Washington Supreme Court. App. 14a-15a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED BY HOLDING THAT RESPONDENTS' WRONGFUL DISCHARGE CLAIM IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Since the enactment of the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151 *et seq.*, during the New Deal, it has been a bedrock rule of labor law that allegations of unfair

labor practices fall within the exclusive jurisdiction of the National Labor Relations Board (NLRB or Board). The Act's "comprehensive regulation of industrial relations by Congress" reflects "the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239, 242 (1959). By granting the Board exclusive jurisdiction over alleged unfair labor practices, Congress specifically intended to preclude state law and state courts from regulating the conduct involved. *See id.* at 244-45. Thus, "[w]hen an activity is *arguably* subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245 (emphasis added). "[C]ourts are not primary tribunals to adjudicate . . . issues" such as "whether the particular activity regulated by the States [is] governed by § 7 or § 8 or [is], perhaps, outside both these sections"; rather, "[i]t is essential to the administration of the [NLRA] that these determinations be left in the first instance to the National Labor Relations Board." *Id.* at 244-45; *see also Wisconsin Dep't of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282, 286 (1986); *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286-91 (1971). Indeed, *Garmon* preemption applies even where (as in *Garmon* itself) the Board has *declined* to exercise its regulatory authority over the conduct in question. 359 U.S. at 245-46.

The *Garmon* rule, to be sure, is not without its exceptions. In particular, courts may apply state law to conduct arguably protected or prohibited by the NLRA where (1) "the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the

States of the power to act," or (2) "the activity regulated [is] a merely peripheral concern" of the Act. *Garmon*, 359 U.S. at 243-44. These exceptions, however, are narrow, and in no way undermine "the broad preemption principle enunciated in *Garmon*." *Lockridge*, 403 U.S. at 284.

The Washington Court of Appeals recognized (as it could hardly avoid doing) that the conduct challenged by respondents (their discharge for allegedly being or supporting whistleblowers on workplace-safety issues) was at least "arguably" within the scope of the NLRA, and thus presumptively preempted under *Garmon*. App. 10a-11a. As the Washington court explained, "we find it at least arguable that the pipe fitters engaged in concerted activities for mutual aid and protection in the pursuit of their claim." *Id.* at 11a.[2]

Notwithstanding that conclusion, the court held that respondents' claim escaped *Garmon* preemption under the exception for "matters of clear local interest." App. 11a. According to the court, "Washington has a substantial interest in regulating discriminatory employment practices," *id.*, and respondents' wrongful-discharge claim implicates "Washington's interest in protecting the health and safety of its workers and citizens," *id.* at 12a; *see also id.* ("Fluor's alleged conduct in terminating employees for refusing to install unsafe valves in a nuclear waste facility, and in terminating employees who supported those who refused to install the valves, clearly touches on interests deeply rooted in local feeling and

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[2] Respondents themselves acknowledged below that "their activities may be characterized as 'concerted activities' under the NLRA, which would normally give rise to disputes being resolved by the NLRB under *Garmon*," and that their opposition to *Garmon* preemption thus hinged solely on the "local interest" exception. Answer to Pet'r's Pet. for Review by the Supreme Court (3/6/02), at 17 n.6; *cf. NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822 (1984) (discharge of employee who refused to drive allegedly unsafe truck fell within NLRB's jurisdiction).

responsibility.") (citing *Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co.*, 73 Cal. App. 4th 918 (1999)).

By holding that respondents' claim escaped *Garmon* preemption under the "local interest" exception, the Washington court erred, and exacerbated an existing conflict in authority over the scope of that exception specifically as applied to claims of wrongful discharge in violation of state public policy by workers claiming to be whistleblowers on workplace-safety issues. As the Eighth Circuit explained in *Platt v. Jack Cooper Transport Co.*, 959 F.2d 91 (8th Cir. 1992), such claims are preempted by the NLRA notwithstanding a State's general interest in promoting workplace safety.

The *Platt* case, like this one, involved a unionized worker who brought a state-law claim alleging wrongful discharge in retaliation for complaining about workplace safety. In sharp contrast to the court below, the Eighth Circuit held the claim preempted by the NLRA, and specifically rejected the application of the "local interest" exception. *Id.* at 94-95. In doing so, the court did not gainsay the local interest in protecting whistleblowers who raise concerns about workplace safety. *See id.* at 95 ("[W]e have no doubt that California, like the federal government, has a strong interest in protecting workers who make job safety complaints, an interest reflected in Cal. Lab. Code § 1102.5, a 'whistleblower' statute, and in Cal. Lab. Code § 6310(b), which prohibits the discharge of employees who make safety related complaints."). As the court explained, however, that interest did not require vindication under state law because the plaintiff "could have brought to the NLRB the specific claim asserted in this lawsuit—that he was fired for making job safety complaints." 959 F.2d at 95. The *Platt* court also emphasized that, in a wrongful-discharge case, "both the retaliatory misconduct

alleged and the remedy sought are directly relevant to the Board's central function, unlike the cases in which a local interest exception has been recognized." *Id.* Precisely the same is true here: the alleged wrongful discharge of unionized workers for being, or supporting, whistleblowers on workplace-safety issues falls squarely within the Board's central function, and respondents could have challenged their discharge by filing an unfair labor practice claim before the Board. What they cannot do is to circumvent the Board's exclusive jurisdiction over such conduct by simply asserting that their claims involve "local interests."

Platt's interpretation of the scope of *Garmon* preemption, however, is not universal. In *Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co.*, 73 Cal. App. 4th 918 (1999)—a case on which the court below expressly relied, *see* App. 11a-12a—the California Court of Appeal "ch[ose] not to follow *Platt*," and held (like the court below) that a state-law claim of wrongful discharge in violation of state public policy survived *Garmon* preemption under the "local interest" exception. *Id.* at 924-28. In *Inter-Modal* (as here and in *Platt*), the plaintiff contended that unionized workers had been wrongfully discharged in retaliation for complaining about workplace safety. According to the *Inter-Modal* court, "the employer's alleged conduct in terminating the plaintiff for . . . refusing to endanger the health and safety of California workers, is clearly conduct which *touches interests deeply rooted in local feeling and responsibility*." *Id.* at 925 (internal quotation and brackets omitted; emphasis in original). The court specifically rejected *Platt*'s conclusion that a wrongful discharge claim by an alleged workplace-safety whistleblower is preempted because "the controversy presented to the state court is identical to . . . that which could have been . . . presented to the Labor Board." *Id.* at 927 (internal quotation omitted).

The Ninth Circuit has gone even further than the California Court of Appeal, holding that *Garmon* preemption analysis is simply "not relevant" to a state-law wrongful-discharge claim. *See Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862 (9th Cir. 1987). In *Paige* (as here, *Platt*, and *Inter-Modal*) the plaintiffs were unionized workers who alleged that they had been wrongfully discharged in retaliation for complaining about workplace safety. The Ninth Circuit rejected a *Garmon* preemption defense based on the truism that the plaintiffs' ostensible state-law claim did not arise under the NLRA. *See id.* The court asserted that the plaintiffs, "as masters of their complaint, did not allege a violation of their rights under the NLRA, but only violations of state statutes and policy. By foregoing their claim based on federal law, the [plaintiffs] may choose to plead their action as a state claim," and thus avoid *Garmon* preemption. *Id.*

The Ninth Circuit's *Paige* analysis makes no sense: the whole point of the *Garmon* doctrine is to determine when ostensible state-law claims are preempted by the NLRA. If the fact that a claim is framed under state law were enough to survive *Garmon* preemption, the doctrine would be a dead letter. What matters is the *conduct* challenged by the claim, not the *label* placed on the claim. *See, e.g., Gould*, 475 U.S. at 289 ("'It is the *conduct* being regulated, not the formal description of governing legal standards, that is the proper focus of concern.'") (emphasis added; quoting *Lockridge*, 403 U.S. at 292); *Gould*, 475 U.S. at 287 ("'[J]udicial concern has necessarily focused on the nature of the *activities* which the States have sought to regulate, rather than on the method of regulation adopted.'") (emphasis added; quoting *Garmon*, 359 U.S. at 243). Not surprisingly, thus, the *Platt* court expressly rejected the *Paige* court's holding on this score. *See* 959 F.2d at 95 n.7 ("[T]o the extent *Paige* holds that plaintiffs may avoid *Garmon* preemption simply by choosing 'to plead their action

as a state claim,'"—which it manifestly does—"we disagree.") (quoting *Paige*, 826 F.2d at 862).

The decision below, *Inter-Modal*, and *Paige* all reflect an unduly narrow scope of *Garmon* preemption. Respondents' ostensible state-law wrongful-discharge claim is nothing more than an "artfully pleaded" unfair labor practice charge. If the "local interest" exception were sufficient to save such a claim from preemption, then the exception would swallow the rule: *every* state-law claim can be said to involve matters of "local interest," because state-law claims by definition implicate some state policy or interest. It is telling that the four cases cited by *Garmon* in support of the "local interest" exception, *see* 359 U.S. at 244 n.2 (citing *International Union, UAW v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956), and *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954)), as well as this Court's subsequent cases applying that exception, *see Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 195 (1978); *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), all involve state laws of general applicability. Although the narrow "local interest" exception may allow States to apply some general laws in the employment context, *see e.g., Sears*, 436 U.S. at 195 (trespass); *Farmer*, 430 U.S. at 296-97, 299-300 (intentional infliction of emotional distress); *Linn*, 383 U.S. at 61-62 (libel); *Russell*, 356 U.S. at 640 (violence); *Youngdahl*, 355 U.S. at 138 (violence); *Wisconsin*, 351 U.S. at 272-75 (violence); *Laburnum*, 347 U.S. at 665-66 (threats of violence), it does not allow States to apply laws (like a wrongful-discharge claim) directed *specifically and exclusively* at that context. The court below thus erred by invoking Washington's alleged "substantial interest in regulating discriminatory employment practices," App. 11a, to avoid *Garmon* preemption. "[I]t is

essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Farmer*, 430 U.S. at 300, 305 (emphasis added).

Indeed, the Washington court's invocation of the "local interest" exception here is particularly outlandish, as respondents are challenging their discharge from a *federal nuclear facility* where the State's occupational health and safety laws *do not even apply*. *See, e.g., Department of Labor & Indus. v. Dirt & Aggregate, Inc.*, 837 P.2d 1018, 1023 (Wash. 1992). "[A]s the cases make clear, the Court has not extended [the "local interest"] exception beyond a limited number of state interests that are at the *core* of the States' duties and traditional concerns." *New York Tel. Co. v. New York Dep't of Labor*, 440 U.S. 519, 550-51 (1979) (opinion concurring in the judgment) (citing cases; emphasis added). It goes without saying that a State cannot claim a compelling interest in protecting alleged whistleblowers on workplace-safety issues in a federal enclave where the State's own workplace-safety laws do not even apply.

Because respondents' ostensible state-law wrongful-discharge claim is preempted by *Garmon*, they are not entitled to pursue such a claim, and their only remedy for the challenged conduct is to file an unfair labor practice charge with the NLRB. The Washington Court of Appeals thus erred by allowing them to proceed with their claim, and thereby exacerbated an existing conflict of authority over the scope of *Garmon* preemption in this context.

II. THE COURT BELOW ERRED BY APPLYING A PRESUMPTION AGAINST ENFORCEMENT OF ARBITRATION CLAUSES CONTAINED IN COLLECTIVE BARGAINING AGREEMENTS.

Even if respondents had a state-law claim that survived *Garmon* preemption, the Washington Court of Appeals further erred by holding that respondents were entitled to pursue that claim in court, rather than in arbitration pursuant to the "exclusive grievance procedure" set forth in their collective bargaining agreement. The court did not deny that the arbitration agreement, if construed in light of the traditional presumption in *favor* of arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, would require arbitration of respondents' claims. Instead, the court applied a presumption *against* arbitration in this context, holding that "an arbitration clause in a CBA will not waive an employee's right to a judicial forum unless such a waiver is *clear and unmistakable*." App. 6a (emphasis added).

The Washington court thereby turned the law on its head. It is axiomatic that the FAA creates a strong presumption in *favor* of, not *against*, arbitration. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). And there is no question now that arbitration clauses contained in CBAs, except to the limited extent those agreements cover transportation workers, are governed by the FAA. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-19 (2001).

The court below purported to base its application of the FAA on this Court's decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), but that reliance was misplaced. *Wright* did not involve the FAA at all; to the contrary, the Court expressly *declined* to consider the applicability of the FAA because neither the parties nor the lower court had addressed that issue. *See id.* at 77 n.1. Contrary to the Washington court's assertion, *Wright* held only that the presumption in favor of arbitration under the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, does not apply to workers' federal statutory claims, because that presumption is based on the principle "that arbitrators are in a better position than courts *to interpret the terms of a CBA*." 525 U.S. at 78 (emphasis in original). Because federal statutory claims do not involve the interpretation of a CBA, the Court held, the LMRA's presumption of arbitration does not apply in this context. *See id.* That reasoning, however, has no application to the FAA, which imposes a presumption in favor of enforcement of arbitration agreements *whatever* their subject matter, and which trumps any contrary state law or policy. *Cf. Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 54 (2d Cir. 2001) (noting that the LMRA is "analytically distinct from the FAA"). Needless to say, *Wright* cannot be deemed conclusive authority on the enforceability of arbitration clauses in CBAs in cases (like this one) governed by the FAA—an issue that *Wright* expressly declined to address.

Indeed, the lower courts are in open disarray on the very issue presented here: whether, and under what circumstances, an arbitration clause in a CBA can be deemed to waive an employee's right to a judicial forum for individual employment-related claims. That confusion stems primarily from the interplay between two of this Court's decisions: *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Gardner-Denver reflects an outmoded judicial antipathy toward arbitration (characterizing it as inferior to the judicial process for resolving statutory claims, *see* 415 U.S. at 57-58), and states that a union cannot bind its members to arbitration of their individual claims in a CBA, *see id.* at 51 ("[T]here can be no prospective waiver of an employee's [statutory] rights," including the right to a judicial forum, in a CBA). *Gilmer*, in contrast, reflects the "current strong endorsement" of arbitration even of individual employment-related claims, and specifically disavows *Gardner-Denver*'s antipathy toward arbitration. 500 U.S. at 30 (internal quotation omitted), 34 n.5. Because the arbitration clause in *Gilmer* was not contained in a CBA, however, that case did not specifically address the ongoing vitality of *Gardner-Denver* in that context. *See id.* at 35.

The question thus remains (as this Court noted, but expressly declined to answer, in *Wright*) "whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*." 525 U.S. at 80. The lower courts are clearly and expressly divided on this question. The Fourth Circuit has held that *Gilmer* effectively overruled *Gardner-Denver*, and that arbitration clauses in CBAs presumptively waive employees' right to a judicial forum just like arbitration clauses in other binding employment-related agreements. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir. 1996) ("Whether the dispute arises under a contract of employment growing out of a securities registration application, a simple employment contract, *or a collective bargaining agreement*, an agreement has yet been made to arbitrate the dispute.") (emphasis added). Eight other federal courts of appeals disagree, and hold that even after *Gilmer*, an arbitration clause in a collective bargaining agreement is either *per se* unenforceable, or (as the court below held) subject to a presumption *against* arbitration of individual employee claims.

See Rogers v. NYU, 220 F.3d 73, 75-77 (2d Cir. 2000) (*per curiam*); *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 481-86 (D.C. Cir.), *vacated*, 199 F.3d 487 (D.C. Cir. 1999) (*en banc*), *reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (*en banc*); *Albertson's, Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758, 761-62 (9th Cir. 1998); *Penny v. UPS*, 128 F.3d 408, 413-14 (6th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453-54 (10th Cir. 1997), *vacated on other grounds*, 524 U.S. 947 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 360-65 (7th Cir. 1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996); *see also Torrez v. Consolidated Freightways Corp.*, 58 Cal. App. 4th 1247, 1249-60 (1997). These decisions "disagree with the result and reasoning of the Fourth Circuit" in *Austin*, *Brisentine*, 117 F.3d at 526, and acknowledge the clear "circuit split" on this issue, *Pryner*, 109 F.3d at 363; *see also Rogers*, 220 F.3d at 75 & n.1; *Air Line Pilots*, 199 F.3d at 484; *Albertson's*, 157 F.3d at 761-62; *Penny*, 128 F.3d at 413; *Harrison*, 112 F.3d at 1453; *Torrez*, 58 Cal. App. 4th at 1249-50 & n.1, 1257-59; *cf. Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 154 (4th Cir. 2002).

The court below exacerbated this circuit split by applying a presumption against arbitration of respondents' ostensible state-law claim here, even though respondents (as union members) are unquestionably bound by a CBA (negotiated by their union representatives) with an arbitration clause. That presumption is impossible to square with the FAA, which commands precisely the opposite presumption. And there is no reason to apply a presumption against arbitration but for *Gardner-Denver*'s outmoded antipathy toward arbitration. Under the Fourth Circuit's analysis in *Austin*, which recognized that unions have the power to waive individual employee rights in CBAs and did not employ any presumption

against such waiver, respondents' claims are plainly subject to arbitration.

Indeed, even those decisions that disagree with *Austin* do not necessarily endorse the notion that arbitration clauses in CBAs should be construed differently than such clauses in all other agreements. Rather, a number of those decisions simply hold that they are constrained by *Gardner-Denver*, and emphasize that it is up to this Court, not a lower court, to repudiate that decision. *See Air Line Pilots*, 199 F.3d at 484 ("We . . . leave to the Court itself the prerogative of overruling its own precedent (if it will); we apply the law as it stands.") (citing *Rodriguez*, 490 U.S. at 484); *Brisentine*, 117 F.3d at 525 ("It may be that the Supreme Court has cut [*Gardner-Denver*] back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of [*Gardner-Denver*]. We will leave that to the Supreme Court.") (also citing *Rodriguez*, 490 U.S. at 484). That is hardly a ringing endorsement of *Gardner-Denver* over *Gilmer*; to the contrary, it is an invitation for this Court to clarify the "obviou[s] . . . tension" between those two precedents. *Wright*, 525 U.S. at 76; *see also Air Line Pilots*, 199 F.3d at 483.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, AND CHARLES CABLE,	) No. 20157-1-III)))) Division Three) Panel Six))
Appellants,	))
v.	) PUBLISHED) OPINION
FLUOR FEDERAL SERVICES Inc. (formerly, FLUOR DANIEL NORTHWEST, INC.), a Washington Corporation, FLUOR HANFORD, INC., (formerly, FLUOR DANIEL HANFORD, INC.), a Washington Corporation,	))))))))
Respondents,	))
JERRY NICHOLS, an individual and his marital community, DAVID FOUCAULT, an individual and his marital community, AND JIM HOLLADAY, an individual and his marital community,	)))))))
Defendants.	) FILED) December 4, 2001

SCHULTHEIS, J. — We are concerned today with federal preemption of a state-law claim filed by workers who were

parties to a collective bargaining agreement. In a recent decision, the United States Supreme Court held that the Federal Arbitration Act, 9 U.S.C. §§ 1 to 16, requires enforcement of arbitration clauses in employment contracts, subject to certain exceptions. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). The 11 appellants here[1] were union pipe fitters working at the Hanford nuclear weapons facility as employees of Fluor Daniel Northwest, Inc. In 1999, they filed a complaint against Fluor Federal Services, Inc. and Fluor Hanford, Inc. (collectively referred to herein as "Fluor"),[2] and three administrative employees of Fluor. They alleged they were wrongfully terminated in retaliation for their whistleblowing activities. Before trial, Fluor moved for dismissal and a remand for arbitration. Based on *Circuit City*, the trial court granted Fluor's motion, but stayed the order pending review by this court.

On appeal, the pipe fitters contend the decision in *Circuit City* does not apply to collective bargaining agreements and at any rate does not apply to the arbitration provision at issue here. Additionally, the pipe fitters argue that Fluor is collaterally estopped from raising the issue of federal preemption based on § 301 of the Labor Management Relations Act, 1947 (29 U.S.C. § 185(a)), and contend state court jurisdiction over this case is not preempted by the National Labor Relations Act (29 U.S.C. §§ 157, 158). We find that the

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[1] The 11 appellants are: Scott Brundridge, Donald Hodgin, Jessie Jaymes (we note that Ms. Jaymes's name was incorrectly spelled in the complaint), Clyde Killen, Pedro Nicacio, Shane O'Leary, Raymond Richardson, James Stull, Randall Walli, David Faubion, and Charles Cable.

[2] Fluor Daniel Northwest, Inc. is now called Fluor Federal Services, Inc. The prime contractor that operates the Hanford facility for the Department of Energy is Fluor Hanford, Inc. (formerly Fluor Daniel Hanford, Inc.), a wholly owned subsidiary of Fluor, Inc. (formerly Fluor Hanford, Inc.). Fluor Daniel Northwest, a sister corporation of Fluor Hanford, served as a construction subcontractor to Fluor Hanford and other contractors at the Hanford site.

arbitration provision in the pipe fitters' collective bargaining agreement does not mandate arbitration for a claim of wrongful discharge in violation of public policy. We further find no federal preemption. Accordingly, we reverse and remand for trial.

FACTS

Because this is an appeal of a trial court's grant of a motion to dismiss, we review de novo, drawing all inferences from the facts in favor of the plaintiffs. *In re Estate of Peterson*, 102 Wn. App. 456, 462, 9 P.3d 845 (2000), *review denied*, 142 Wn.2d 1021 (2001). According to the evidence presented by the pipe fitters, all were members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 598. As union members, they were parties to a collective bargaining agreement (CBA) that included a grievance procedure requiring binding arbitration for any disputes arising "out of the interpretation or application of this AGREEMENT." Clerk's Papers (CP) at 171.

In late May 1997, five of the pipe fitters refused to install valves on a pipeline running through a nuclear waste facility because they believed the valves were underrated for the degree of pressure that would be placed on them. Higher rated valves were soon provided, and the five pipe fitters installed them. A few days later, the five, along with two other crewmembers, were laid off. After the pipe fitters were laid off, several other pipe fitters vocally supported the terminated workers. These pipe fitters lost their jobs in March and April 1998 and May 2000.

In June 1997, the union filed a grievance pursuant to the CBA protesting the layoffs of the first pipe fitters, but then withdrew the grievance in early February 1998 for lack of evidence that the CBA had been violated. The first laid-off pipe fitters were reinstated in March 1998, but they were again laid off in October and November 1998. All of the pipe fitters

filed complaints with the Department of Labor, alleging that Fluor had retaliated against them in violation of the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C. § 5851. In March 2000, however, they dismissed their administrative claims. They had filed suit in state court in 1999 for wrongful discharge in violation of public policy and for civil conspiracy. Eventually all of the appellants joined this lawsuit.

Fluor filed a notice of removal of civil action to United States District Court in August 1999, asserting federal jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. After reviewing the pipe fitters' complaint, the district court judge found that the claims did not require interpretation of the terms of the CBA and therefore were not preempted by § 301. Additionally finding that the plaintiffs' complaint did not assert a federal law claim and did not rest solely on federal public policies, the district court granted the plaintiffs' motion to remand to state court.[3] The civil conspiracy claim was dismissed on summary judgment in September 2000.[4] After extensive discovery and delay, trial was set to begin in May 2001.

In March 2001, the United States Supreme Court decided *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001), which concluded that the Federal Arbitration Act, 9 U.S.C. §§ 1 to 16, requires the enforcement of arbitration clauses in employment contracts other than the contracts of transportation workers. This decision overruled previous Ninth Circuit authority. *Circuit City*, 121 S. Ct. at 1306, 1311. On the basis of *Circuit City*,

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[3] The pipe fitters' motion to take judicial notice of documents filed in the removal proceedings is granted.

[4] After the elimination of the civil conspiracy claim, Fluor Hanford was dismissed as a party. The remaining claim for wrongful discharge is directed solely at Fluor Daniel Northwest, Inc., now known as Fluor Federal Services, Inc.

Fluor moved in April to dismiss or to stay the action in favor of arbitration. After a hearing on May 3, 2001, the trial court granted the motion from the bench, staying the case pending appeal to this court.

APPLICATION OF THE FEDERAL ARBITRATION ACT AFTER *CIRCUIT CITY*

The purpose of the Federal Arbitration Act (FAA) is to overcome the courts' historical reluctance to enforce agreements to arbitrate. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). To achieve this purpose, the FAA compels judicial enforcement of a wide range of arbitration agreements. 9 U.S.C. § 2; *Circuit City*, 121 S. Ct. at 1307. However, § 1 of the FAA excludes from the act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C.A. § 1 (West 1999).

Prior to the decision in *Circuit City*, most federal courts of appeal held that this exception was limited to written arbitration agreements involving transportation workers. Only the Ninth Circuit interpreted the § 1 exception to exclude all contracts of employment from the reach of the FAA. *Circuit City*, 121 S. Ct. at 1307. *Circuit City* laid the issue to rest by holding that § 1 exempts from the FAA only contracts of employment of transportation workers. *Id.* at 1311. The employment agreement in *Circuit City* was an individual contract and the application of the FAA was in federal court. In dicta, the court referred to its earlier decisions in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) and *Allied-Bruce* as enduring authority for the rule that the FAA applies as well in state courts and preempts state antiarbitration laws to the contrary. *Circuit City*, 121 S. Ct. at 1312-13.

The pipe fitters argue here that although *Circuit City* and the FAA apply to employment contracts entered into by

individuals, they do not apply to union-negotiated CBAs. But the very case cited for this assertion, *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357 (7th Cir. 1997), concludes after reviewing numerous court decisions that the FAA is generally applicable to CBAs. *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (discussing the application of the FAA to a collective bargaining agreement arbitration clause in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)). We conclude as a matter of law that the FAA is applicable to the CBA in the present case. What remains is to determine whether the arbitration clause in the pipe fitters' CBA waives their rights to a judicial forum for the state-law claim.

Collective bargaining agreements, while beneficial in many respects to both the worker and the employer, may be less than optimum in meeting the individual needs of particular workers. With collective bargaining arbitration, the interests of the individual may be subordinated to the collective interests of all employees. *Gilmer*, 500 U.S. at 34. In recognition of that inherent tension, federal courts have established that an arbitration clause in a CBA will not waive an employee's right to a judicial forum unless such a waiver is clear and unmistakable. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79-80, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998) (right to a federal forum); *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir.) (right to federal forum), *cert. denied*, 122 S.Ct. 464 (2001).

A clear and unmistakable waiver of the right to a judicial forum can occur in two ways. *Safrit*, 248 F.3d at 308. First, the CBA may contain an explicit arbitration clause wherein the parties agree to submit all causes of action arising out of employment to arbitration. *Id.* Second, the agreement may have a general clause requiring arbitration under the employment agreement, coupled with a provision that makes it unmistakably clear that the statutes that are the basis for the

asserted claims (*e.g.*, discrimination statutes, occupational health and safety statutes, and whistleblowing statutes) are part of the agreement. *Id.* Further, in determining whether a particular claim is covered by an arbitration clause, it must be remembered that a labor arbitrator has authority solely to resolve questions of contractual rights, not to invoke public laws that conflict with the bargain between the parties. *Gilmer*, 500 U.S. at 34.

In this case, the CBA grievance procedure requires binding arbitration for any disputes "aris[ing] out of the interpretation or application of this AGREEMENT[.]" CP at 171. As we shall see below, the pipe fitters' claim for wrongful discharge in violation of public policy does not require interpretation or application of any term in the agreement. Fluor cites no provision in the CBA wherein health and safety or whistleblowing statutes have been explicitly incorporated. *See Rogers v. N.Y. Univ.*, 220 F.3d 73, 76 (2nd Cir.) (discrimination claims), *cert. denied*, 531 U.S. 1036 (2000). Further, this boilerplate arbitration provision is not sufficiently specific: it does not clearly and unmistakably waive the right to a judicial forum for tort claims arising independently of the CBA. Because the CBA does not contain a clear and unmistakable waiver of the pipe fitters' rights to a judicial forum for state-law claims, the trial court erred in dismissing the action and in remanding it for arbitration.

The pipe fitters additionally claim that Fluor waived its right to compel arbitration because it knew long before *Circuit City* that the Ninth Circuit had applied the FAA to compel arbitration of Title VII[5] employment claims. They also contend that Fluor did not bring this matter to arbitration in a timely manner. Waiver of a contractual right is disfavored and the party seeking waiver bears a heavy burden of persuasion. *Steele v. Lundgren*, 85 Wn. App. 845, 852, 935 P.2d 671

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[5] Title VII of the Civil Rights Act of 1964, codified as 42 U.S.C. § 2000e-3(a).

(1997). To prove waiver of a right to arbitrate, a party must demonstrate that the other party knew of a right to compel arbitration, acted inconsistently with that right, and that prejudice has occurred. *Id.* at 849. Before *Circuit City*, the Ninth Circuit decided in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1998) that the FAA did not apply to labor or employment contracts. The pipe fitters filed their lawsuit in 1999, after the decision in Craft and before *Circuit City*. Although they had pursued various administrative remedies before that time, they have not shown with any particularity when the right to compel arbitration should have attached during those negotiations. Accordingly, the trial court did not err in finding that Fluor did not waive its right to compel arbitration under the CBA.

FEDERAL PREEMPTION UNDER THE LABOR MANAGEMENT RELATIONS ACT AND THE NATIONAL LABOR RELATIONS ACT

Noting that this court may affirm on any basis supported by the record,[6] Fluor raises two additional arguments to affirm the trial court's decision. Both involve subject matter jurisdiction, and therefore may be addressed on appeal even though they were not raised in superior court. RAP 2.5(a)(1); *Harting v. Barton*, 101 Wn. App. 954, 960, 6 P.3d 91 (2000), *review denied*, 142 Wn.2d 1019 (2001). Jurisdiction is a question of law reviewed de novo. *Local Union I-369, Oil, Chemical & Atomic Workers Int'l Union v. Sandvik Special Metals Corp.*, 102 Wn. App. 764, 770, 10 P.3d 470 (2000), *review denied*, 143 Wn.2d 1006 (2001).

I. Section 301 of the Labor Management Relations Act. In the first of these jurisdictional arguments, Fluor contends the pipe fitters' claim is preempted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a). Pursuant to 301, federal law exclusively governs suits requiring interpretation of the terms of a CBA. *Caterpillar Inc. v.*

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[6] *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 670, 975 P.2d 950 (1999).

Williams, 482 U.S. 386, 394, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). State-law claims are preempted by § 301 if they are "substantially dependent" on the analysis of a CBA. *Id.* However, the bare fact that a bargaining agreement will be consulted during state-law litigation will not extinguish the claim. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 990 (9th Cir. 2001). Moreover, a state-law claim is not preempted merely because a defense is raised based on the terms of a CBA. *Id.*

The pipe fitters' claim of wrongful termination in violation of public policy implicates a nonnegotiable right and consequently is not preempted by federal law. *Huntley v. Frito-Lay, Inc.*, 96 Wn. App. 398, 401, 979 P.2d 488 (1999), *cert. denied*, 531 U.S. 818 (2000); *Wilson v. City of Monroe*, 88 Wn. App. 113, 117-18, 943 P.2d 1134 (1997). Further, the right does not arise from or depend on interpretation of the CBA. *Smith v. Bates Technical College*, 139 Wn.2d 793, 803, 991 P.2d 1135 (2000). Because it is independent of the contractual agreement between the pipe fitters' union and Fluor, a claim of wrongful termination in violation of public policy is not subject to § 301 preemption. *Id.*; *Wilson*, 88 Wn. App. at 119.

In any event, Fluor is estopped from raising this issue because it is identical to the issue Fluor raised in federal district court when attempting to assert federal jurisdiction. Collateral estoppel, also called issue preclusion, prevents relitigation of an issue after a party has had a full and fair opportunity to litigate it. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). The party asserting the doctrine must show that (1) the issue decided in prior adjudication is identical with the one currently raised; (2) the prior adjudication ended in a final judgment on the merits; (3) the party raising the issue was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine would not work an injustice. *Id.* at 263; *Spahi v.*

Hughes-Northwest, Inc., 107 Wn. App. 763, 774, 27 P.3d 1233, 33 P.3d 84 (2001).

Fluor contends it is not estopped from raising the issue of § 301 preemption because the federal district court was only concerned with jurisdictional issues and did not decide the case on its merits. True, but the issue *is* jurisdictional and the district court entered a final judgment that concluded the pipe fitters' claim was not preempted by § 301. The § 301 issue was identical in district court, the district court adjudication ended in a final judgment on the merits *of that action*, Fluor was a party to the action, and Fluor fails to show how application of collateral estoppel would work an injustice here.

II. The National Labor Relations Act. In its second jurisdictional attack, Fluor contends the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157 and 158, preempts the application of Washington law to this controversy. The NLRA establishes workers' rights to organize and engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C.A § 157 (West 1998). The act further provides that it is unlawful for employers to interfere with the exercise of those rights. 29 U.S.C. § 158. Usually the National Labor Relations Board (NLRB) is given exclusive jurisdiction over controversies even arguably involving unfair labor practices under the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 662, 880 P.2d 988 (1994). However, two exceptions exist, for matters that "touch[] interests . . . deeply rooted in local feeling and responsibility" or where the regulated activity is merely a peripheral concern of federal labor law. *Garmon*, 359 U.S. at 244.

The pipe fitters contend their joint claim and their attempts to seek administrative redress for their wrongful termination do not constitute "concerted activities" under the NLRA. Although the term "concerted activities" is not defined in the NLRA, employees acting together and individuals acting as

representatives of other employees are considered engaged in concerted activities for the purposes of the NLRA. *NLRB v. Portland Airport Limousine Co.*, 163 F.3d 662, 665 (1st Cir. 1998). Because our concern is whether the actions of the pipe fitters are "arguably" subject to the NLRA, we find it at least arguable that the pipe fitters engaged in concerted activities for mutual aid and protection in the pursuit of their claim.

Even so, however, the pipe fitters' state-law claim for wrongful discharge in violation of public policy touches matters of clear local interest. In *Hume*, four former employees brought an action alleging employer retaliation for assertion of wage claims under RCW 49.46.100. The court found that the employer retaliation regulated by the statute touched a deeply rooted local concern and therefore fell under the *Garmon* exception. *Hume*, 124 Wn.2d at 664. As the court noted, the NLRB inquiry would focus on whether the overtime wage claims were protected concerted activity, while the state cause of action focused instead on whether the employees were discharged in retaliation for their overtime claims. *Id.* at 664-65. Consequently, the state-law claim was different from that which could have been, but was not, presented to the NLRB. *Id.* at 665.

Washington has a substantial interest in regulating discriminatory employment practices, and this regulation does not threaten undue interference with federal labor law. *Delahunty v. Cahoon*, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992) (citing *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 188, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978)). Fluor argues that cases applying the *Garmon* exception are based on state statutes and involve only private sector workplaces, citing *Hume; Delahunty; Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co.*, 73 Cal. App. 4th 918, 87 Cal. Rptr. 2d 60 (1999); and *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987). These are distinctions without significance. We have already established that no term of the CBA must be interpreted in the

resolution of the pipe fitters' claim. Further, the elements for proving wrongful discharge in violation of public policy include (1) existence of a clear public policy; (2) evidence that discouraging the conduct in which the plaintiffs are engaged would jeopardize the public policy; (3) proof that the public-policy-linked conduct caused the dismissal; and (4) no overriding justification for the dismissal. *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2000). The clarity element requires evidence that the employer's conduct contravened "'the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.'" *Id.* (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). In establishing their claim, the pipe fitters will necessarily cite constitutional, statutory, and/or regulatory laws evidencing Washington's interest in protecting the health and safety of its workers and citizens.

Ultimately, the claim of wrongful discharge in violation of public policy is different from any claim that could have been brought before the NLRB. The claim does not implicate collective bargaining or unionization. *See Inter-Modal*, 87 Cal. Rptr. 2d at 64. And the claimed violations of Washington's health and safety laws are not even arguably unfair labor practices. *Id.* Finally, Fluor's alleged conduct in terminating employees for refusing to install unsafe valves in a nuclear waste facility, and in terminating employees who supported those who refused to install the valves, clearly touches on interests deeply rooted in local feeling and responsibility. *Id.* Consequently, the *Garmon* exceptions apply to prevent federal preemption of the pipe fitters' claim.

ATTORNEY FEES

The pipe fitters request attorney fees and costs on appeal. Pursuant to RCW 49.48.030, a party who successfully recovers judgment for wages or salary owed is entitled to reasonable attorney fees assessed against the employer or former employer. In this case, however, the pipe fitters have not yet obtained a judgment for owed wages. *See Cohn v. Dep't of*

Corrs., 78 Wn. App. 63, 70, 895 P.2d 857 (1995). Consequently, the request for attorney fees under this statute is premature.

CONCLUSION

To summarize, we conclude that *Circuit City* and the FAA generally apply to CBAs. However, we further conclude that the FAA does not require arbitration in this case because the arbitration clause does not clearly and unmistakably waive the pipe fitters' right to a judicial forum for their claim of wrongful discharge in violation of public policy. We further hold that federal jurisdiction under the LMRA and the NLRA does not preempt this claim.

Reversed and remanded for trial.

/s/
Schultheis, J.

WE CONCUR:

/s/
Kurtz, C.J.

/s/
Sweeney, J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, and CHARLES CABLE,	) No. 72254-4)) **ORDER**)) C/A No. 20157-1-III
Respondents,	
V.	
FLUOR FEDERAL SERVICES, Inc. (formerly, FLUOR DANIEL NORTHWEST, INC.), a Washington Corporation, FLUOR HANFORD, INC., (formerly, FLUOR DANIEL HANFORD, INC.), a Washington Corporation,	
Petitioners,	
JERRY NICHOLS, an individual and his marital community, DAVID FOUCAULT, an individual and his marital community, AND JIM HOLLADAY, an individual and his marital community,	
Defendants.	

A Special Department of the Court (composed of Justices Smith, Madsen, Ireland, Owens and Chief Justice Alexander)

considered this matter at its August 7, 2002, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 7th day of August, 2002.

/s/ Gerry L. Alexander
CHIEF JUSTICE

APPENDIX C

Hon. Carolyn A. Brown

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR BENTON COUNTY

SCOTT BRUNDRIDGE, et al.	)	Case No. 99-2-01250-7
	)	
Plaintiffs,	)	
vs.	)	ORDER GRANTING
	)	DEFENDANTS'
FLUOR DANIEL, INC., a California Corporation, et al.	)	MOTION TO DISMISS OR IN THE ALTER-
	)	NATIVE TO STAY
Defendants.	)	THIS ACTION
	)	

Defendants' Motion to Dismiss came on for hearing on May 3, 2001. Defendants were represented at the hearing by William R. Squires III of Summit Law Group, and the plaintiffs by Dana L. Gold and John P. Sheridan of the Government Accountability Project. The Court has reviewed the parties' motion papers, including the declarations and accompanying exhibits, and considered the arguments of counsel.

The Court finds that *Circuit City Stores v. Adams*, 2001 WL 273205 (2001) controls this case and requires that the matter be arbitrated pursuant to the Federal Arbitration Act.

Based on the argument of counsel and the evidence presented, the Court grants defendants' Motion to Stay the Proceedings pending the appeal of this ruling.

IT IS ORDERED.

Dated this 4th day of May 2001.

/s/ Carolyn A. Brown
Benton County Superior Court Judge
Carolyn Brown

Presented by:

SUMMIT LAW GROUP PLLC
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Dana L. Gold, WSBA #25219

(2)

Supreme Court, U.S.
FILED
FEB 3 2003
OFFICE OF THE CLERK

No. 02-896

In The

Supreme Court of the United States

FLUOR HANFORD, INC., AND
FLUOR FEDERAL SERVICES, INC.,

Petitioners,

v.

SCOTT BRUNDRIDGE, DONALD HODGIN,
JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO,
SHANE O'LEARY, RAYMOND RICHARDSON,
JAMES STULL, RANDALL WALLI,
DAVID FAUBION, AND CHARLES CABLE,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Washington

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Do wrongful discharge actions for violation of state health and safety laws fall within the "local interests" exception to preemption under the National Labor Relations Act?

Does the Federal Arbitration Act compel arbitration of employee claims based on rights arising outside of a collective bargaining agreement if the CBA includes no express reference to such rights and if it mandates arbitration of "any disputes that arise out of the interpretation or application of this agreement"?

LIST OF PARTIES

Petitioner is Fluor Federal Services, Inc.

Respondents include Scott Brundridge, Donald Hodgin, Jessie Jaymes, Pedro Nicacio, Shane O'Leary, Raymond Richardson, James Stull, Randall Walli, David Faubion, and Charles Cable and are all represented by Sheridan and Baker. Clyde Killen, who is also a respondent, is not represented by Sheridan and Baker.

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STATEMENT OF THE CASE

In May 1997, five of the respondents herein, pipefitters Clyde Killen, Pedro Nicacio, Shane O'Leary, James Stull, and Foreperson Randall Walli, in addition to two other pipefitters, Daniel Phillips and Terry Holbrook, were employees of petitioner working on a crew at Hanford's 200-West area assigned to the W-058 project. These five pipefitters were told by petitioner's management to install and use underrated valves in a pipe that was being pressure tested with thousands of gallons of water, and in close proximity to hazardous waste storage tanks. CP 345-348.

The valves were underrated, because they were not rated to withstand the pressure to which they would be subjected, if management's order had been implemented. CP 345-348. The five pipefitters were concerned that use of the valves would result in their failure, which could result in the injury or death of workers who would be stationed near the valves, as had happened previously under similar circumstances at petitioner's facility. CP 499.

After discussions between the pipefitters and petitioner's management, it was agreed that the valves would be installed and tested on the condition that no employees were within 100 feet of the valves during the test. Managers then changed their position and insisted that the pipefitters stand near the valves during the test. The five pipefitters refused to use the valves during the test. CP 345-348.

Petitioner's Manager Miller then arrived at the site and yelled profanities at the five pipefitters for refusing to use the underrated valves. Following discussions between the pipefitters and Miller about the underrated valves, petitioner's agents located properly rated valves that were

on-site. The five pipefitters then installed the valves and conducted the pressure test. CP 345-348.

Several days later, without explanation, Foreperson Walli was demoted – which caused him to resign – and most of the crew was laid off. CP 348. Manager Miller told General Foreperson Nichols that he had manipulated the personnel work schedules in order to dismiss Pipefitter Walli and others in Walli's crew, because he was "tired of all the safety issues being raised." CP 500. Referring to the layoffs, Miller bragged to another manager that he got rid of his problems all at once. CP 680-1.

The pipefitters were represented by Local No. 598 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and worked for petitioner under a collective bargaining agreement, the Hanford Site Stabilization Agreement (the CBA). CP 157-210.

On June 20, 1997, Union Local 598 filed a grievance with petitioner in response to the layoffs. CP 152-210, 582. The petitioner maintained at the time of filing that "no grievable action ha[d] taken place." CP 582. The union could not adequately investigate the layoffs, since it lacked discovery tools such as subpoena power. In addition, under the CBA, retaliatory layoff is much harder to prove than wrongful termination. CP 855-6. That is because the CBA does not require management to state a reason for a layoff; the CBA does require the employer to state a reason for a termination.

On February 8, 1998, the union withdrew the grievance, because it lacked the "ability to provide direct evidence of a violation of the Hanford Site Stabilization

Agreement." CP 1454. No further grievances were filed by the Union for subsequent layoffs of the respondents.

On August 4, 1997, pipefitters Randall Walli, Clyde Killen, Pedro Nicacio, Shane O'Leary, James Stull, Daniel Phillips, and Terry Holbrook filed a complaint with the U.S. Department of Labor under 42 U.S.C. § 5851, the employee protection provisions of the Energy Reorganization Act (Act), alleging that Fluor had retaliated against them for engaging in protected whistleblowing activity. CP 652. An investigation by the Department of Labor (DOL) ensued. Fluor claimed that the safety issues raised were not within the ambit of the ERA on the grounds that the DOL lacked jurisdiction to investigate. CP 667. The DOL disagreed and found that Fluor had retaliated against the pipefitters in violation of the Act and recommended immediate reinstatement, back pay, compensatory damages, and attorney fees. CP 658-672, 677.

Fluor appealed the DOL findings and an administrative hearing was scheduled pursuant to the Act. Just prior to the hearing, petitioner settled with the respondents. CP 1455-56, Resp. Appendix at 14a-15a. Pursuant to the settlement, Fluor agreed to reinstate the pipefitters ["refusing pipefitters"] and to pay compensation covering back pay, compensatory damages and attorney fees. CP 1455-1456.

The facts pertaining to the June 1997 layoffs that led to the DOL Fluor settlement do not form the basis for the wrongful discharge claims at issue here. CP 247-255. However, they are the origin of the retaliation that followed reinstatement, which does form the basis for the respondents' individual wrongful discharge claims.

At the end of February 1998, after the settlement agreement was signed, Fluor managers held a meeting

with the pipefitter forepersons and represented that the DOL settlement expressly *required* that seven current pipefitters be laid off and that the seven pipefitters whom the DOL found to have suffered retaliation be reinstated. CP 778. The representation was false.

Relying on this misrepresentation – which indicated that the refusing pipefitters had secured their own jobs and settlement benefits at the expense of the jobs of their union brothers – twelve forepersons and the general foreperson drafted and signed a petition to protest the forced reinstatement of the seven pipefitters they understood to be required by the settlement. CP 896, Resp. Appendix at 17a. The petition, dated March 4, 1998, listed seven pipefitters selected for layoff. CP 896, Resp. Appendix at 17a.

Four of the pipefitters listed were the pipefitter respondents who had individually supported the refusing pipefitters. Three or four days after the layoffs of those pipefitters, respondent Pipefitter Scott Brundridge began to voice his opinion in the lunch trailer that all of the remaining pipefitters should stand up for safety in support of their Union brothers. CP 685-686. Respondent Pipefitters Donald Hodgin and Scott Brundridge also voiced their support of the refusing pipefitters in the lunch trailer, in the presence of the other workers and forepersons. CP 698-699. Pipefitter Ray Richardson called the Department of Energy hotline to express his safety concerns about the valves and his disapproval of the layoffs of the refusing pipefitters. CP 698-699, 736. Respondent pipefitter Jessie Jaymes expressed support for the refusing pipefitters and was named as a witness for the complainants in preparation for the Department of Labor hearing. CP 759, 764-766. These seven pipefitters, including respondents

Brundridge, Hodgin, Jaymes and Richardson, were laid off effective March 10, 1998. CP 1014, 1023.

On April 6, 1998, these four newly laid off pipefitters filed a complaint with the DOL alleging that they had been unlawfully retaliated against under 42 U.S.C. § 5851 for engaging in the protected activity of supporting the refusing pipefitters. CP 1014-1027. In this matter, DOL issued its investigative finding, which held that Brundridge, Hodgin, Jaymes, and Richardson all engaged in protected whistleblowing activity under the Energy Reorganization Act for their various actions expressing vocal support of the refusing pipefitters. CP 1023-1024. The finding, however, credited Fluor's contention that the layoffs were not motivated by the protected activity, but were ordered because Fluor needed to make room for the reinstatement of the refusing pipefitters and that there was not enough work to support seven additional workers. CP 1025-1026.[1]

---

[1] The DOL investigation was limited in scope and failed to uncover critical evidence that was obtained in discovery in this litigation. For example, Ivan Sampson, one of petitioner's managers, testified at a deposition, under subpoena, that in early March 1998 he had overheard a telephone conversation between General Foreperson Nichols and Manager Holladay about pending layoffs. Corroborated by contemporaneous personal journal entries, Sampson testified that he heard Nichols tell Holladay on the phone that he felt he had a place for a couple of the fitters [meaning that there was no need to lay off seven]. CP 589-599, 903. Sampson testified that Holladay was so loud through the phone that he could hear him from across the room through the receiver yell, "I don't care, we're laying off seven for seven." CP 589-599, 903. Holladay then yelled, "Is Ivan there? You tell that son of a bitch that **I'll rip his balls off** if he tells anybody about this." CP 589-599, 903. Pursuant to Holladay's orders, seven pipefitters were laid off for the returning pipefitters.

Pipefitters Brundridge, Hodgin, Jaymes and Richardson appealed the DOL investigative finding and requested a hearing on the merits before an Administrative Law Judge. CP 1039.

The refusing pipefitters returned to the work site on or about March 10, 1998, pursuant to the settlement. CP 1041, 1045. They were split up and assigned to different crews. Rumors in the workplace indicated that management intended to lay off the returning pipefitters within six months of their return to work. CP 485. Pipefitters Walli, Killen, Nicacio, and Stull were laid off on October 2, 1998, and Pipefitter O'Leary was laid off on November 25, 1998; Fluor stated each of these layoffs resulted from "lack of work." CP 1043.

Pipefitters Walli, Killen, Nicacio, Stull, and O'Leary filed another complaint with the DOL, alleging that Petitioner Fluor again had retaliated against them in violation of the whistleblower protection provisions of the Energy Reorganization Act. CP 1031-1034.

In August 1999, Pipefitters Walli, Killen, Nicacio, Stull, O'Leary, Brundridge, Hodgin, Jaymes and Richardson elected to pursue claims for wrongful discharge in violation of public policy and civil conspiracy in Washington State Court, and dismissed their administrative claims, because of the limitations of the DOL forum and to prevent collateral estoppel from precluding their state court claims. CP 771-774.

Respondent David Faubion, a pipefitter at Hanford for over twenty-three years, joined the lawsuit because he was laid off ten days after being told by Fluor management not to talk with any of the pipefitters who were reinstated pursuant to the DOL settlement. CP 500-501. Faubion had

chosen to carpool with Randall Walli, who was one of the reinstated pipefitters. CP 500-501. Faubion's position was instantly filled by another worker. CP 501, 933, 957.

On August 18, 1999, petitioner filed a Notice of Removal of Civil Action to U.S. District Court. Petitioner argued that respondents' wrongful discharge and civil conspiracy claims were preempted by the Labor Management Relations Act, § 301, 1947 (LMRA), 61 Stat. 156, 29 U.S.C. § 185, because their employment was governed by a collective bargaining agreement. CP 1258-1261. Petitioner also claimed federal question jurisdiction on the grounds that strong federal and national security interests were implicated, because the events and the parties involved in the suit related to the Hanford facility. CP 1246-1247. Petitioner did not allege preemption under 29 U.S.C. §§ 157, 158.

Respondents filed a Motion for Remand to state court. Respondents argued that interpretation of the terms of the CBA was not required to resolve the independent state law claims of wrongful discharge and civil conspiracy and therefore that Section 301 did not preempt their claims. CP 1238; *also see Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988). Respondents also argued that national security was not implicated by their claims. CP 1244-7.

The parties submitted documentary evidence for consideration by the court including: attorney and witness declarations, the Hanford Site Stabilization Agreement, Justification for Use of PL 85-804, the 6/9/97 Text of Presidential Memo, excerpts of the deposition transcripts of Henry Tonning, Roger Tool, Ivan Sampson, Jeff Stair, James Hanna, and Fred Rutt, the Pipefitter Settlement

Agreement, Defendant's responses to Plaintiffs' First Interrogatories, and the July 3, 1996 Management Excerpts. *See* Respondent's Motion for Judicial Notice filed in Court of Appeals.[2]

The CBA contains a grievance procedure, culminating in arbitration, for resolving disputes that "arise out of the interpretation or application of this AGREEMENT." CP 171, Resp. Appendix at 19a. The CBA further provides that:

> No such grievance shall be recognized unless called to the attention of the EMPLOYER by the UNION or to the attention of the UNION by the EMPLOYER in writing or postmarked with ten (10) working days after the alleged violation was committed. . . . Failure to process a grievance, or failure to respond in writing, within the time limits provided above . . . shall be deemed a waiver of such grievance. . . . "

CP 170.

The CBA also states that "no employee will be required to perform any work in an unsafe manner or unsafe condition" CP 170, Resp. Appendix at 18a and that:

> it will not be a violation of this AGREEMENT when the EMPLOYER considers it is necessary to shut down to avoid possible loss of human life because of an emergency situation that could endanger the life and safety of an employee. . . .

---

[2] The motion for judicial notice was granted by the Court of Appeals. Pet. App. at 4a n. 3.

> Employees shall not be *discharged* for refusing to work in the above-described situations.

CP 170 (Emphasis added).

On December 20, 1999, Judge Shea of the U.S. District Court for the Eastern District of Washington granted Respondents' Motion for Remand to the Superior Court of Washington for Benton County. CP 1248, Resp. Appendix at 13a.

Following *Lingle*, the court held that plaintiffs' state wrongful discharge claims were not preempted under section 301, because their adjudication did not require interpretation of the CBA. CP 1238-1248, Resp. Appendix at 3a-13a. The court found that reference in the complaint to the CBA was to show petitioner's failure to base plaintiffs' layoffs on the legitimate reasons articulated in the CBA – skill, productivity, and qualifications – and thereby to prove that defendant's motive in discharging plaintiffs was retaliatory. CP 1242-1243. The court explained that "[p]laintiffs rely on the factual history preceding their discharge as direct and circumstantial evidence that retaliation was the reason [for the layoffs]." CP 1243, Resp. Appendix at 7a-8a.

The court found that the petitioner's contention that federal jurisdiction was mandated by strong federal and national security interests was unsubstantiated, and that the argument turned on inapposite authorities concerning disputes between government contractors and subcontractors. CP 1242-1243.

In March, 2000 respondent Pipefitter Charles Cable testified under subpoena in a deposition that he had been told by petitioner's supervisors approximately six months

earlier that Daniel Phillips and Terry Holbrook, two of the refusing pipefitters, had been placed on the layoff list but could not be laid off until litigation was over. CP 247-255, 1104, 1109-1119. On May 2, 2000, Cable, a pipefitter at Hanford since August 1993, was laid off. CP 1116-1117. Cable then joined this lawsuit.

On August 10, 2000, one month prior to trial, defendant moved for summary judgment. CP 1539-1563. No federal issue was raised in the motion.

On September 20, 2000, Superior Court Judge Carolyn Brown granted defendant's motion for summary judgment as to plaintiffs' civil conspiracy claims, but denied the motion as to plaintiffs' claims for wrongful discharge in violation of public policy.[3] CP 1319.

On April 12, 2001, petitioner filed a Motion to Dismiss Or, In The Alternative, To Stay This Action based on the Federal Arbitration Act (FAA). CP 227-244. Petitioner did not allege preemption under 29 U.S.C. §§ 157, 158.

On May 3, 2001, Judge Brown granted defendant's Motion, finding that this Court's decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) dictated that plaintiffs' wrongful discharge claims proceed to arbitration under the FAA. RP 17. Upon request by plaintiffs, Judge Brown stayed the order to allow for appeal of her ruling. RP 18.

---

[3] The trial court's dismissal of plaintiffs' civil conspiracy claims was not a subject of the appeal.

On appeal to the Washington Court of Appeals, in its responsive brief, petitioner raised for the first time a preemption claim under 29 U.S.C. §§ 157, 158. On December 4, 2001, the Court of Appeals reversed the decision of the trial court, holding that respondents' claims are neither preempted by the NLRA nor are they subject to mandatory arbitration under the FAA.

Respondent petitioned for review in Washington's Supreme Court and the petition was denied on August 7, 2002. *Pet.* at 14a-15a. On August 13, 2002, a mandate issued returning the case to the Washington Superior Court for trial. Resp. Appendix at 1a-2a. Petitioner filed its petition for writ of certiorari on December 4, 2002.

Respondents also note the following additional misstatements and omissions in the Petition for Writ of Certiorari. Fluor Hanford, Inc., appears as a petitioner on the case caption, but it is not a party to this action. *Pet.* at 4. Fluor Hanford, Inc. was dismissed as a party at summary judgment. See *Pet.* Appendix at 4a, n. 4. Fluor Federal Services, Inc. (Fluor), formerly Fluor Daniel Northwest, Inc., was the sole employer of the respondents and is the subject of the wrongful discharge claims in issue in this case.

Citing the Opinion of the Washington Court of Appeals in this case, petitioner asserts that the CBA between petitioner and respondents' union "included (1) a guarantee that workers would not be *laid off* for refusing to work in unsafe conditions . . . App. 3a." *Pet.* at 4. (Emphasis added). The CBA contained no such guarantee and the Court of Appeals' opinion does not state the CBA does contain such a guarantee. The CBA, as noted above, prohibits "discharge" for such refusal. Petitioner has

represented its actions towards respondents as "layoffs." CP 659, 1299-1306.

Throughout this litigation, petitioner has denied the existence of unsafe conditions associated with the incidents preceding the "layoffs." CP 659, 1299-1306. Petitioner also has denied throughout this litigation that there was any connection between its layoffs of several of the respondents and their above-mentioned refusal to use an underrated valve. CP 659, 1299-1306.

Petitioner's assertion that it "implemented a series of reductions in force that eliminated the jobs of 81 pipefitters, including all eleven respondents" is false. *See Pet.* at 4. Petitioner Fluor disregarded its own criteria for selecting pipefitters for layoff – including work performance, length of service, dependability, certifications and training – in terminating respondents. Instead, respondents were selected for termination at the direction of Fluor management with the support of the general foreperson and forepersons. CP 573-580; Resp. Appendix at 17a.

REASONS FOR DENYING THE WRIT

I. WRONGFUL DISCHARGE CLAIMS FOR VIOLATION OF STATE HEALTH AND SAFETY LAWS FALL SQUARELY WITHIN THE "LOCAL INTERESTS" EXCEPTION TO *NLRA* PREEMPTION

Respondents have each asserted separate state law claims of wrongful discharge in violation of public policy. Each respondent must prove the following elements to prevail: (1) the existence of a clear public policy; (2) that discouraging the conduct in which they engaged would

jeopardize the public policy; (3) that the public-policy-linked conduct caused the dismissal; (4) the defendant must not be able to offer an overriding justification for the dismissal. *Roberts v. Dudley*, 140 Wn.2d 58, 64-65 (2000).

Respondents' claims turn variously on 1) having been discharged for reporting and then refusing to use an unsafe, underrated valve in a pressurized pipe, 2) having supported the above-mentioned refusing pipefitters by offering testimony, reporting the retaliation, speaking out in their support, car pooling with one of the refusing pipefitters or testifying honestly during depositions in connection with litigation on behalf of the refusing pipefitters. Respondents have cited Washington State health and safety laws and regulations that express public policy, whose implementation has been thwarted by their discharge. CP 254, 1242, 1245, 1317.

Petitioner now argues – having failed to raise this claim either in the state trial court, or in the federal district court below – that respondents' claims are preempted under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (*Garmon*). *Pet.* at 9.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) this Court explained that the National Labor Relations Board generally has exclusive jurisdiction to resolve disputes involving unfair labor practices, except where state-regulated conduct touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Respondents' claims for wrongful discharge in violation of Washington Health and Safety laws fall within this exception. See *Inter-Modal Rail*

Employees Ass'n v. Burlington Northern and Santa Fe Ry. Co., 73 Cal. App. 4th 918, 924-928 (1999); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862-865 (9th Cir 1987), cert. denied, 486 U.S. 1054 (1988).

As the California Court of Appeal has explained:

> 'Congress's main goal in enacting the NLRA was to establish an equitable bargaining process. . . . State laws which set minimum safety standards do not interfere with the bargaining process itself. . . . In *Metropolitan Life v. Mass [(1985) 471 U.S. 724 [105 S. Ct. 2830, 85 L. Ed. 2d 728]], the Supreme Court considered the legislative history of the NLRA and made the following statement: "Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. The States traditionally have had great latitude under their police power to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons [Citation.] States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples. [Citation]"*
>
> . . . .

> As it is uniquely within the states' police powers to legislate for the health and safety of their citizens, and such regulation does not interfere with the NLRA's goals, federal law does not preempt such statutes.'

Inter-Modal, 73 Cal. App. 4th at 926-927 (citing *Paige*, 826 F.2d at 863-865) (emphasis in original).

Petitioner contends that the Eighth Circuit case of *Platt v. Jack Cooper Transport Co.*, 959 F.2d 91 (8th Cir. 1992) shows that *Garmon* is broader than has been recognized and that, in fact, the NLRA *does* preempt "claims of wrongful discharge in violation of state public policy by workers claiming to be whistleblowers on workplace-safety issues." *Pet.*, p. 9. Petitioner urges that this Court adopt what it understands to be the *Platt* court's approach to *Garmon* and resolve a putative split on this issue between the Eighth Circuit and other jurisdictions.

Respondents submit that petitioner reads more into *Platt* than the Eighth Circuit asserts in that case, and that the construction given to *Garmon* by the Eighth Circuit does not differ significantly from that arrived at by other courts. Indeed, rather than articulating new doctrine, *Platt* was an expressly fact specific decision:

> [O]n the facts of this case, we conclude that Platt's state law claims are preempted by the NLRA as construed in Garmon and its progeny. We do not reach the question whether employee suits seeking redress for violation of state whistle-blower statutes are generally preempted under Garmon because we believe the 'local interest' exception to Garmon preemption requires a more fact-sensitive approach.

Platt, 959 F.2d at 95; see *Inter-Modal*, 73 Cal. App. 4th at 927 (*Platt's* " holding was limited to its facts").

The facts on which the *Platt* court focused were that the plaintiff had invoked both the grievance procedure provided by the collective bargaining agreement and the authority of National Labor Relations Board prior to bringing his action in state court. See *Platt*, 959 F.2d at 95 n. 7 ("*Paige v. Henry Kaiser Co.*, 826 F.2d 857, 862 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988), upon which Platt relied, is distinguishable for this reason").

> [It] is highly relevant that Platt unsuccessfully sought relief through the grievance process, and directly from the NLRB, before commencing this lawsuit. 'The risk of interference with the Board's jurisdiction is . . . obvious and substantial' when an unsuccessful charge to the Board is recast as a state law claim. *Local 926, IUOE v. Jones*, 460 U.S. 669, 683 (1983). As the Eleventh Circuit said in *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1517 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989):
>
> 'We believe that the [Garmon preemption] rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court.'

Platt, 959 F.2d at 95. Respondents in this case, in contrast, neither grieved the claims underlying this action nor did they present them to the NLRB.

In addition, it is noteworthy, as the California Court of Appeal observed in *Inter-Modal*, that the plaintiff in *Platt* did not even assert that his claim fell within the local

interests exception to *Garmon* preemption. *Inter-Modal*, 73 Cal. App. 4th at 928; see *Platt*, 959 F.2d at 95. The resulting "thin" analysis in *Platt* of the question of whether state health and safety claims fall within *Garmon's* local interests exception was one of the reasons the *Inter-Modal* court cited for declining to follow *Platt*. *See Inter-Modal*, 73 Cal. App. 4th at 928.

Petitioner, in short, has adduced no authority for its broad claim that state whistleblower actions are preempted under *Garmon*. The case on which petitioner relies is manifestly inapposite to the facts of this case, and indeed, is unusually ill-suited to serve as the basis for development of the law on this question.

Finally, respondents note that petitioner, a contractor at the Hanford nuclear facility, asserts that its employees at Hanford are not protected by Washington's health and safety laws. *Pet.* at 13. Petitioner has adduced no authority showing that persons employed by contractors at Hanford lack these protections, and respondents are aware of none. *See* Resp. Appendix at 11a-12a.

II. THE RIGHT TO LITIGATE VIOLATIONS OF INDIVIDUAL RIGHTS IN COURT MAY NOT BE WAIVED THROUGH A CBA, WHICH DOES NOT INCLUDE A CLEAR AND UNMISTAKABLE WAIVER OF THAT RIGHT

Citing this Court's decision in *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79-80 (1998), the Court of Appeals held that respondents were not obligated under the Federal Arbitration Act (FAA) to arbitrate their wrongful discharge claims, because the CBA did not clearly and

unmistakably waive their individual rights to litigate such claims in court. *Pet.,* Appendix 6a-8a.

Petitioner argues that the Court of Appeals erred, because "*Wright* held only that the presumption in favor of arbitration under the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 does not apply to workers' federal statutory claims . . . " *Pet.* at 15. *Wright* is not so narrow. *Wright* articulates, and indeed reaffirms, a general condition for the waiver of individual rights through collective bargaining agreements:

> Not only is petitioner's statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear. . . . *'We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.'*

Wright, 525 U.S. at 79-80 (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)) (emphasis added).

The case whose language *Wright* quotes for this proposition, *Metropolitan Edison Co. v. NLRB*, does not even address the presumption of arbitrability. *Metropolitan*, rather, concerned the conditions under which a CBA may waive the statutory rights of certain individuals, specifically the rights of union officials under the National Labor Relations Act to not be subject to harsher sanctions than other employees. *Metropolitan*, 460 U.S. at 695, 697-698.

In *Metropolitan*, the union had filed an unfair labor practice charge based on the employer's discriminatory

punishment of union officials and the employer defended, *inter alia*, by arguing that the union had waived the officials' statutory right to not be subjected to differential punishment. *Id.* at 705, 707-708. *Metropolitan* held there was no waiver of the right, because the putative basis of the waiver – acquiescence in the face of prior arbitration decisions under the CBA affirming such punishment – did not constitute a clear and unmistakable waiver of the right. *Id.* at 708-710.

Thus, both this Court's express language in *Wright*, and the case from which it borrowed that language clearly demonstrate that *Wright* articulates a general standard for the waiver of individual rights through a collective bargaining agreement, and not simply a qualification of the LMRA's presumption of arbitrability. The Court of Appeals' reliance on *Wright* in this case, therefore, was manifestly appropriate, regardless of the applicability of the FAA. *See Rogers v. New York Univ.*, 220 F.3d 73, 75-77 (2nd Cir. 2000), cert. denied, 531 U.S. 1036 (2000) (holding FAA did not compel arbitration of individual discrimination claim, because the CBA failed to satisfy *Wright* standard for waiver of individual rights). Moreover, the Court of Appeals' finding that the CBA in this case failed to satisfy the *Wright* standard is unassailable.

The CBA here is limited to disputes that "arise out of the interpretation or application of this AGREEMENT." CP 171, Resp. Appendix at 19a. At no point does the CBA include any "explicit incorporation of statutory" protections. *See Wright*, 525 U.S. at 80. Thus, even less than the CBA in issue in *Wright*, which provided "for arbitration of 'matters under dispute,'" does the CBA in this case clearly and unmistakably waive respondents' rights to litigate in

court their claims for violation of state laws. *See id.* at 80-81; *see also Lingle*, 486 U.S. at 411-413.

In short, there is no reason to doubt that *Wright* articulates the condition under which the right to litigate in court claims concerning rights based in law independent of a CBA may be waived through a CBA. Since the language in this CBA is manifestly insufficient to effect such waiver, this case offers an extremely poor vehicle for resolution of the question petitioner would have this Court address: "whether, and under what circumstances, an arbitration clause in a CBA can be deemed to waive an employee's right to a judicial forum for individual employment related claims." *Pet.* at 15.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

RANDY BAKER
JOHN P. SHERIDAN
Counsel of Record
SHERIDAN & BAKER
Hoge Building, Suite 1200
705 Second Ave.
Seattle, WA 98104
(206) 381-5949

COURT OF APPEALS, DIVISION III,
STATE OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, AND CHARLES CABLE, Appellants, v. FLUOR FEDERAL SERVICES INC. (formerly FLUOR DANIEL NORTHWEST, INC.) a Washington Corporation, FLUOR HANFORD, INC., (formerly, FLUOR DANIEL HANFORD, INC.), a Washington Corporation, Respondents. JERRY NICHOLS, an individual and his marital community, DAVID FOUCAULT, an individual and his marital community, AND JIM HOLLADAY, an individual and his marital community, Defendants.	**MANDATE** No. 20157-1-III Benton County No. 99-2-01250-7

The State of Washington to: The Superior Court of the State of Washington, in and for **Benton** County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on **December 4, 2001** became the decision terminating review of this court in the above-entitled case on **August 7, 2002**. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

In testimony whereof, I have hereunto
set my hand and affixed the seal
of said Court at Spokane, this
13th day of August, 2002.

/s/ Patricia P. Crandall
Clerk of the Court of Appeals, State of Washington
Division III

cc: John P. Sheridan
Dana L. Gold
William R. Squires
Lawrence C. Locker
Hon. Carolyn A. Brown

(SEAL)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, and DAVID FAUBION,

Plaintiffs,

v.

FLUOR DANIEL, INC., a California corporation; FLUOR DANIEL HANFORD, INC., a Washington corporation; FLUOR DANIEL NORTHWEST, INC., a Washington corporation; JERRY NICHOLS, an individual and his marital community; DAVID FOUCAULT, an individual and his marital community; and JIM HOLLADAY, an individual and his marital community.

Defendants.

NO. CT-99-5073-EFS

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND TO STATE COURT

BEFORE THE COURT is Plaintiffs' Motion to Remand to State Court (Ct. Rec. 10). The Court heard oral argument on the motion on October 14, 1999. John P. Sheridan and Dana L. Gold represented Plaintiffs. William R. Squires III and Elizabeth R. Kennar represented

Defendants. Charlie MacLeod also participated for Defendants. The Court has reviewed the briefing and record, has considered the arguments, and is fully informed. For the reasons stated below, Plaintiffs' motion to remand is granted.

I. BACKGROUND.

In August 1999, Plaintiffs filed their Complaint and Amended Complaint in Superior Court of the State of Washington for Benton County against Defendants. (Ct. Rec. 6.) The Amended Complaint set forth the state law causes of action of wrongful discharge in violation of public policy and of civil conspiracy. (First Am. Compl. for Damages and Demand for Jury Trial, Ct. Rec. 6, ¶ 3.2.)

Plaintiffs were union pipefitters who worked at the United States Department of Energy ("DOE") Hanford nuclear weapons facility as employees of Defendant Fluor Daniel Northwest, Inc. ("FDNW"). Defendants FDNW and Defendant Fluor Daniel Hanford, Inc. ("FDH"), which created FDNW as an enterprise company, are wholly owned subsidiaries of Defendant Fluor Daniel, Inc. ("FD"). DFH is the primary DOE contractor responsible for "much of the cleanup project at the Hanford facility." (Decl. of James H. Hanna in Supp. of Defs.' Opp'n to Mot. for Remand, Ct. Rec. 19, ¶ 2.)

Plaintiffs allege that, in March 1997, FDNW management directed five of the Plaintiffs ("Plaintiffs I") to install a valve in a line that would carry high-level nuclear waste. The valve was under-rated for the pressure that would flow through the pipe; Plaintiffs I refused to install it for safety reasons. They were terminated in June 1997. The remaining Plaintiffs ("Plaintiffs II") vocally supported

Plaintiffs I. Plaintiffs I filed administrative claims with the Department of Labor under the Energy Reorganization Act "ERA"). Prior to the administrative hearing, Plaintiffs I entered a settlement agreement with FDNW that required immediate reinstatement of Plaintiffs I. In March 1998, Plaintiffs II and several others were terminated, allegedly because FDNW was unable to absorb the reinstatement of Plaintiffs I. Plaintiffs I were laid off again in October and November 1998.

Defendants filed a Notice of Removal of Civil Action to United States District Court (Ct. Rec. 1) and Amended Notice of Removal of Civil Action of United States District Court (Ct. Rec. 5) in August 1999, asserting that removal was proper under 28 U.S.C. § 1441 because the District Court has original "federal question" subject matter jurisdiction under 28 U.S.C. § 1331.

In September 1999, Plaintiffs filed their motion to remand asserting that removal of the case to federal court was improper because the District Court lacked subject matter jurisdiction.

II. STANDARD FOR REMOVAL

A defendant may remove to federal court only those state court actions which could have been originally filed in federal court. *See* 28 U.S.C. § 1441(a); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A claim could have been filed in federal court if it arises under the laws of the United States, i.e., if there is "federal question" subject matter jurisdiction. *See* 28 U.S.C. § 1331. "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). If any one of Plaintiffs'

claims comes within the jurisdiction of the federal court, removal is proper as to the whole case. *See* 28 U.S.C. § 1441(c). The party seeking removal has the burden of establishing federal jurisdiction. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1995 (9th Cir. 1988).

III. DISCUSSION

Defendants assert the Court has original "federal question" subject matter jurisdiction because 1) Plaintiffs claims are preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, since Plaintiffs' employment with FDNW is governed by a collective bargaining agreement ("CBA") and since Plaintiffs' claims require interpretation of that agreement; 2) Plaintiffs seek recovery for the alleged violation of the federal policies promoting worker safety and protecting workers reporting health and safety violations; and 3) strong federal and national security interests are necessarily implicated by the involvement of the Hanford facility and reconstruction project.

A. Federal Question Jurisdiction and Preemption of Section 301 of the LMRA

If Plaintiffs' claims require interpretation of the CBA, they will be preempted by Section 301 of the LMRA and therefore will arise under the laws of the United States and provide federal question jurisdiction. *See Caterpillar*, 482 U.S. at 393 (holding that the preemptive force of the federal law "converts an ordinary state common-law complaint into one stating a federal claim"). "Section 301 governs claims founded directly on rights created by collective-bargaining agreements." *Id.* at 394. "[I]f the

resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is preempted and federal labor-law principles . . . must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-406 (1988). However, "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." *Id.* at 410.

1. Wrongful Discharge

Plaintiffs base their wrongful discharge claim on the allegation that they were discharged in March, October, and November of 1998 in retaliation for refusing to engage in unsafe practices or in retaliation for vocally supporting those who were fired after reporting safety problems. (Mem. of P. & A. in Supp. of Mot. for Remand to State Ct., Ct. Rec. 12, at 1-2.) Under Washington state law a successful claim of wrongful discharge in violation of public policy requires showing that 1) a clear public policy exists; 2) discouraging the employee's conduct would jeopardize the policy; 3) the public-policy related conduct causes the dismissal; and 4) there was no overriding justification for the dismissal. *See Gardner v. Loomis Armored Inc.*, 128 Wash. 2d 931, 941 (1996). Defendants argue that proving the third and fourth elements of the tort of wrongful discharge in violation of public policy will require interpreting the CBA. (Ct. Rec. 5 ¶ 4; Defs.' Opp'n to Pls.' Mot. for Remand, Ct. Rec. 20 ¶ B.2. at 9)

Interpretation of the CBA is not required to determine the propriety of Plaintiffs' termination or Plaintiffs' entitlement to recovery. Plaintiffs rely on the factual history

preceding their discharge as direct and circumstantial evidence that retaliation was the reason. The CBA permits layoffs based on skill, productivity and qualifications. Plaintiffs assert that examination of their credentials eliminates any question that they could have been laid off for those reasons. Such an argument does not require an interpretation of the CBA but rather the facts preceding and surrounding their layoffs.

2. Civil Conspiracy

Plaintiffs base their civil conspiracy claim on the allegation that Defendants' conduct in laying them off in March, October and November 1998 amounted to civil conspiracy. (Ct. Rec. 12 at 2.) To succeed in their claim, Plaintiffs must prove by clear, cogent and convincing evidence that 1) "two or more persons combined to accomplish an unlawful purpose or combined to accomplish some purpose not in itself unlawful by unlawful means" and 2) "the alleged coconspirators entered into an Agreement to accomplish the object of the conspiracy." *Corbit v. J.I. Case Co.*, 70 Wash. 2d 522, 528-29 (1967). Defendants assert that the CBA must be interpreted to determine if Defendants' acts were "unlawful means" or accomplished an "unlawful purpose."

The facts Plaintiffs allege to support their civil conspiracy claim are 1) that Defendant FDNW Construction Director Foucault and Defendant FDH General Counsel MacLeod deliberately misrepresented the terms of the settlement agreement as requiring the lay off the same number of pipefitters as were being reinstated under the settlement agreement; this misrepresentation resulted in the layoff of Plaintiffs II; 2) that Defendants insisted in

laying off the same number of pipefitters as were reinstated despite the discovery of two jobs which would prevent laying off all seven pipefitters; 3) that Defendant FDNW Construction Operations Manager Holladay discouraged managers from finding places for the returning Plaintiffs. (Ct. Rec. 6 ¶ 2.12.)

Even though analysis of the claim may involve identifying the terms of the settlement agreement or of the CBA, or both, no interpretation of the agreement or the CBA is required. As discussed above, Plaintiffs rely on the facts surrounding the discharges as evidence that Defendants were conspiring to lay them off, not on the interpretation of either the agreement of the CBA.

3. Conclusion

Neither Plaintiffs' wrongful discharge claim nor Plaintiffs' conspiracy claim requires interpretation of the CBA. The claims are therefore not preempted by Section 301 of the LMRA and do not provide federal question jurisdiction on the basis of Section 301 preemption.

B. Federal Question Jurisdiction and Reliance on Federal Policies

Plaintiffs assert that their discharges violated "state and federal public policies of promoting worker safety, protecting the environment from radioactive material and hazardous waste, promoting the safe storage and disposal of radioactive and hazardous materials promoting clean water, and protecting those who report health and safety violations." (Ct. Rec. 6 ¶ 3.2.) Defendants assert that Plaintiffs' claims arise under federal law and provide federal subject matter jurisdiction because Plaintiffs 1)

assert their discharges violated federal public policies and 2) reference 42 U.S.C. § 5851, the whistleblower provision of the ERA, in the recitation of facts portion of their complaint (Ct. Rec. 6 ¶¶ 2.3, 2.4).

On its face, Plaintiffs' Complaint asserts no federal law claim. Plaintiffs' claims of wrongful discharge in violation of public policy and civil conspiracy are state law claims. *See, e.g., Gardner*, 128 Wash. 2d at 941 (setting forth the elements for public policy wrongful discharge torts; *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 232 (1984) (recognizing "a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy). Plaintiffs explicitly state that "no recovery based on a federal claim is sought." (Mem. of P. & A. in Supp. of Mot. for Remand to State Ct., Ct. Rec. 12 ¶ III at 7.) Mere reference to a federal law or statute in the complaint does not create a federal claim. *See Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 344 (9th Cir. 1996). Furthermore, Plaintiffs' reference to 42 U.S.C. § 5851, specifically, does not create a federal claim as a result of preemption. Section 5851 states that it

> may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

42 U.S.C.A. § 5851(h) (West 1995).

That the Plaintiffs rest their wrongful discharge claim in part on federal public policies also does not create a federal claim. "When a claim can be supported by alternative and independent theories – one of which is a state law

theory and one of which is a federal law theory – federal question jurisdiction does not attach because federal law is not a necessary element of the claim." *Rains*, 80 F.3d at 346. In *Rains*, the court observed that the plaintiff's claim "that he was wrongfully terminated in violation of public policy" was "supported by three alternative theories – one for each of the three sources of law he cites to establish that his termination was in violation of public policy." *Id.* at 347. Because one of the sources of law plaintiff cited was "unquestionably wholly independent of federal law," the court found there was no federal jurisdiction. *Id.* Here, Defendants do not deny that Washington state laws prohibit the discharge of an employee for reporting safety violations.

Because Plaintiffs' Complaint does not assert a federal law claim and because Plaintiffs' claims do not rest solely on federal claims do not rest solely on federal public policies, federal question jurisdiction does not attach on the basis that Plaintiffs included federal public policy as a theory for the wrongful discharge claim.

C. Federal Question Jurisdiction Stemming from Strong Federal and National Security Interests

Defendants assert the existence of federal question jurisdiction because strong federal and national security interests are necessarily implicated because the events and parties involved in the complaint relate to the Hanford facility. Federal question jurisdiction exists where a suit concerns "matters affecting the operation of the federal government, where the rule must be uniform throughout the country." *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 643-44 (9th Cir.

1961). In *American Pipe*, the court held that "the construction of subcontracts, let under prime contracts connected with the national security, should be regulated by a uniform federal law." 292 F.2d at 644. Similarly, in *New SD, Inc. v. Rockwell International Corporation*, 79 F.3d 953 (9th Cir. 1996), the court held that federal law governed a suit between a subcontractor and a prime contractor to the United States Air Force regarding a prime contract for development of military hardware. Noting that national security was implicated, the court relied in part on *American Pipe* and held that

> [w]here the federal interest requires that "the rule must be uniform throughout the country," . . . then the "entire body of state law applicable to the area conflicts and is replaced by federal rules." . . . When federal law applies . . . it follows that the question arises under federal law, and federal question jurisdiction exists.

Rockwell, 79 F.3d at 955 (citations omitted).

Here, however, the suit does not involve a dispute between prime- and sub-contractors regarding a contracted for good or services. Rather, the suit concerns a dispute between an employer and its employees. Although the context of this dispute is arguably similar to those in *American Pipe* and *Rockwell* since Plaintiff employees worked on an environmental clean-up project at a federal nuclear facility, caselaw does not clearly extend the "strong federal and national security interest" federal question jurisdiction to suits involving a government contractor's labor disputes. This Court declines to take so large a step and finds there is no "national security interest" federal question jurisdiction.

IV. CONCLUSION

Since Defendants have failed to prove federal jurisdiction exists on any of the three bases they assert, removal of this case to federal district court is improper for lack of subject matter jurisdiction. Accordingly,

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Remand to State Court (Ct. Rec. 10) is GRANTED.

2. This case is hereby REMANDED to Benton County Superior Court.

IT IS SO ORDERED. The District Court Executive is directed to enter this order, provide copies to counsel, prepare and enter JUDGMENT accordingly, and CLOSE THIS FILE.

DATED this day of 20th December 1999.

/s/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

EXHIBIT 34

FLUOR DANIEL

Fluor Daniel Hanford, Inc.
P.O. Box 1000
Richland, WA 99352

Settlement Agreement Between Employers
Fluor Daniel Northwest, Inc. and
Terry Holbrook, Clyde Killen, Pete Nicacio,
Shane O'Leary, Dan Phillips,
James D. Stull, Randall J. Walli
DOL Case No. 98-ERA-4

Fluor Daniel Northwest, Inc. (FDNW) and the above named seven Complainants agree to the following:

1. FDNW agrees to pay each of the Complainants $42,000.

2. This $42,000 per Complainant is not a "make whole" amount or based on any wage formula, rather it is for case settlement.

3. FDNW agrees to offer reinstatement of employment to each of the Complainants within two weeks of the signing of this Settlement Agreement.

4. FDNW agrees to pay Complainants' attorneys, the Government Accountability Project and Project on Liberty and the Workplace, a total of $40,000 in legal expenses.

5. FDNW and Complainants agree to work for U.S. Department of Labor (DOL) approval of this Settlement Agreement and FDNW will pay the designated amounts within two weeks of final DOL approval.

6. FDNW admits no wrongdoing of any kind by signing this Settlement Agreement.

7. Complainants agree DOL Case No. 98-ERA-4 is settled by the signing of this Settlement Agreement.

8. Complainants agree that all disputes arising out of their employment with FDNW are settled by this Agreement as the purpose of this agreement is to dispose of all disputes between Complainants and FDNW. This Agreement constitutes a full and complete release of all claims made or which could have been made, against FDNW, its officers, employees, or representatives with respect to the subject matter of DOL Case No. 98-ERA-4.

9. FDNW and Complainants agree that this Settlement Agreement is to be interpreted by federal law governing these DOL proceedings and as appropriate with the laws of the State of Washington.

Signed by FDNW and Complainants this 23rd day of February, 1998.

Complainants:

/s/ Terry Holbrook
Terry Holbrook

/s/ Clyde Killen
Clyde Killen

/s/ Pete Nicacio
Pete Nicacio

/s/ Shane O'Leary
Shane O'Leary

For the Employer:

/s/ Joe D. Davis
Joe D. Davis, President
Fluor Daniel Northwest, Inc.

/s/ Dan L. Phillips
Dan Phillips

/s/ James D. Stull
James D. Stull

/s/ Randall J. Walli
Randall J. Walli

BEST AVAILABLE COPY

---------- Message Contents ----------

THIS LIST MADE ON 3-4-98 BY JERRY NICHOLS TO PRESENT TO FOREMANS FOR CONCURRENCE AT A 2:00 PM MEETING ON SAME DATE. THIS INCLUDES INPUT FROM CONVERSATIONS WITH STEVE JASPER.

PHILLIPS-------HODGES--------TOOL
STULL----------KNODE/GERKIN---SIELER--TRANSFER FLEMING TO DESGROSIELLE
O'LEARY--------KLAGES---------LUCHI
KILLEN---------RICHARDSON-----KIRKPATRICK
WALLI----------JAYMES---------KIRKPATRICK
NICACIO--------BRUNDRIDGE-----LUCHI---TRANSFER JONES TO HICKMAN R
HOLBROOK-------DAVENPORT------JASPER

THE FOLLOWING LIST OF EMPLOYEES WILL BE LAID OFF AS AGREEDED TO BY THE FOREMEN IN ATTENDANCE.

Hodgin D.R.
Church JW
Klages CA
Richardson RB
Jaymes J
Brundridge SD
Davenport

17a

EXHIBIT 3 Kirkpatrick

FOREMANS IN CONCURRENCE

This reduction of existing personnel does not reflect the employee's that we feel will better FDNW pipefitter work force, Due to the federal mandate to reinstate 7 previously terminated employee's.

R.J. Kirkpatrick
C.A. Williams
[illegible]
A.E. Enlow
[illegible]
[illegible]
Gregory B Hutchinson
[illegible]

Tony L Heath
Brad F. Desgrosellier
Steve Jasper by Caudline
Randy Browne by Request from Randy Browne

EXHIBIT 44

SAFETY AND HEALTH

Section 1. The EMPLOYER acknowledges its responsibility to comply with all applicable laws, ordinances, and regulations relating to safety and health. No employee will be required to perform any work in an unsafe manner or unsafe condition.

Section 2. The employees covered by the terms of this AGREEMENT shall at all times be bound by the safety rules and regulations as established by the EMPLOYER in accordance with the Department of Energy safety rules and regulations. Any employee's failure to comply with the safety requirements heretofore referred to or failure to participate and cooperate in such program shall be cause for discharge.

Section 3. The UNIONS agree that all employees will be required to use all required safety equipment and all required protective clothing supplied by the EMPLOYER. Failure or refusal to use such protective equipment is cause for discharge.

Section 4. It will not be a violation of this AGREEMENT when the EMPLOYER considers it is necessary to shut down to avoid the possible loss of human life because of an emergency situation that could endanger the life and safety of an employee. In such cases, employees will be compensated only for the actual time worked. In the case of a situation described above whereby the EMPLOYER requests employees to standby, the employees will be compensated for the "standby" time. Employees shall not be discharged for refusing to work in the above-described situations.

ARTICLE XXIV

GRIEVANCE PROCEDURE

Section 1. It is specifically agreed that in the event any disputes arise out of the interpretation or application of this AGREEMENT, excluding questions of jurisdiction of work, which shall be adjusted pursuant to Article XXIII, Jurisdictional Disputes, said disputes shall be settled in accordance with the procedures set out herein. No such grievance shall be recognized unless called to the attention of the EMPLOYEE by the UNION or to the attention of the UNION by the EMPLOYER in writing or postmarked within ten (10) working days after the alleged violation was committed.

Employees must notify their UNION within three (3) working days of the alleged violations

Section 2. Grievances shall be settled according to the following procedure.

> *Step 1*: The written disputes shall be referred to the representative of the UNION involved or his designated representative and the EMPLOYER'S designated representative.
>
> *Step 2*: In the event that the representative of the UNION and the EMPLOYER'S designated representative cannot reach agreement within five (5) working days after a meeting is arranged and held, the matter shall be referred to the representative of the International Union and the designated representative of the EMPLOYER.
>
> *Step 3*: In the event that the representative of the International Union and the EMPLOYER'S representative are unable to resolve the dispute within ten (10) calendar days after completion of

Step 2, it shall be adjusted by arbitration in the manner hereinafter set forth.

The EMPLOYER or his designated representative and the UNION shall then select an arbitrator for final and binding arbitration. The impartial arbitrator shall be selected from a panel of arbitrators submitted by the Federal Mediation and Conciliation Service in accordance with their procedures. The written decision of the Arbitrator shall be binding upon all parties. The arbitrator shall have no authority to change, amend, add to, or detract from any of the provisions of this AGREEMENT. The expense of the impartial arbitrator shall be borne-equally by the EMPLOYER and the UNION.

Step 4: The time limits specified in any step of the grievance procedure may be extended by mutual agreement of the parties initiated by the written request of one party to the other, at the appropriate step of the grievance procedure. However, failure to process a grievance, or failure to respond in writing, within the time limits provided above, without a request for an extension of time, shall be deemed a waiver of such grievance to the other without prejudice or without precedent to the processing of and/or resolution of like or similar grievances or disputes.

EXHIBIT 13

[LOGO]

FLUOR DANIEL NORTHWEST
INTEROFFICE CORRESPONDENCE

CONFIDENTIAL

To: David Foucault
Location: Richland, E668

From: Curt Larsen
Location: Richland, H7-04

Telephone: (509) 376-3367

Date: June 18, 1997
Reference: CGL-97-146

Client
Subject Selection of craft employee's for a layoff

cc: V.C. Hodgin

Per Jim Holladays's request I conducted an internal investigation on June 17, 1997 to see if Fluor Daniel Northwest (FDNW) has a selection process that management follows when selecting craft employees to be laid off.

I spoke with Area Managers, Superintendents, General Foreman and Foreman from the 300, 200E, 200W and 100 Areas. The selection process is as follows:

1. Area Managers and Superintendent work closely together in projecting the work forecast on a weekly basis. As projects slow down or funding is cut the Area Managers and/or the Superintendents contact the General Foreman (GF) or Foreman of the affected craft and inform them of the number of employees needed to be cut.

2. The GF and/or the Foreman select the craft employees by name to be laid off after discussions with other area GF/Foreman for possible placement. The selection process (not particularly in this order) is as follows; work performance, length of service, dependability, certifications and training. Once the

names have been selected the GF and/or the Foremen ask their crew if anyone would like to volunteer to be laid off. If no one steps forward then the names are submitted to the Area Manager. If someone volunteers to be laid off their name is added and someone is deleted from the original list.

3. The Area Manager(s) and Superintendent(s) review the list among themselves checking for positions available within different job area.

During this investigation it was brought to my attention by several employees, bargaining and non bargaining that Jim Holladay side steps the selection process. Mr. Holladay has called Human Resources with names of craft employees to be laid off without going through the GF/Foreman. Furthermore, Mr. Holladay has pulled individuals off the layoff list without notifying the GF/Foreman.

In summary, FDNW has a selection process that is used when downsizing craft employee:

Supreme Court, U.S.
FILED
FEB 14 2003
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(3)

No. 02-896

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

FLUOR HANFORD, INC., AND
FLUOR FEDERAL SERVICES, INC.,

Petitioners,

v.

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES,
CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY,
RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI,
DAVID FAUBION, AND CHARLES CABLE,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Washington

REPLY TO BRIEF IN OPPOSITION

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As noted in the petition, this case presents two important and recurring legal issues on which the lower federal and state courts are divided: (1) whether unionized workers can avoid the exclusive jurisdiction of the National Labor Relations Board (NLRB) over unfair labor practices by bringing a lawsuit alleging wrongful discharge in violation of state public policy, *see* Pet. i, 6-13, and (2) whether unionized workers can avoid an arbitration clause in their collective bargaining agreement by invoking a presumption *against* arbitration of individual employment-related claims, *see id.* at i, 14-18. Respondents attempt to deflect attention from those two issues by arguing the *merits* of their claims, and insisting that the decision below is correct. The issue here, however, is not which side will ultimately prevail in this dispute, but whether a court (as opposed to the NLRB or an arbitration panel) is the appropriate forum to address the dispute in the first place. On that issue, respondents cannot deny that the decision below exacerbated longstanding and acknowledged conflicts among the lower courts. Accordingly, this Court's review is warranted.

1. With respect to preemption under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, respondents do not deny that their state-law wrongful-discharge claim involves concerted activities under the Act, and is thus presumptively preempted under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Instead, respondents (like the court below) assert that their claim survives *Garmon* preemption because it involves "'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act.'" Opp. 13 (quoting *Garmon*, 359 U.S. at 244).

The problem with that assertion, as noted in the petition, is that it would allow a narrow exception to *Garmon* preemption to swallow the rule. The whole point of *Garmon* preemption is to protect the NLRB's role as the principal arbiter of American industrial relations. *See, e.g., Garmon*, 359 U.S. at

241-46; *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286-91 (1971); *Wisconsin Dep't of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282, 286 (1986). To that end, *Garmon* "broad[ly]" preempts state-law claims that even *arguably* involve unfair labor practices. *Lockridge*, 403 U.S. at 284; *Garmon*, 359 U.S. at 245. Contrary to the decision below, the "local interest" exception to the *Garmon* rule does not allow States to "regulat[e] discriminatory employment practices" involving unionized workers, Pet. App. 11a; instead, that exception only allows state-law claims "deeply rooted in local feeling and responsibility" that are "*unrelated* to employment discrimination," *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 296, 305 (1977) (emphasis added). A dispute between unionized workers and their employer *over the validity of their discharge from employment* thus does not fall within that narrow exception; rather, such a dispute falls within the very heartland of the NLRB's domain. Indeed, this Court has *never* found a state-law wrongful-discharge claim to escape *Garmon* preemption. *See* Pet. 12-13.

Respondents base their contrary argument on *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), and *Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co.*, 73 Cal. App. 4th 918 (1999). *See* Opp. 13-14. *Paige*, however, was specifically rejected by *Platt v. Jack Cooper Transport Co.*, 959 F.2d 91, 95 & n.7 (8th Cir. 1992), which in turn was specifically rejected by *Inter-Modal*, 73 Cal. App. 4th at 927-28. Respondents try to deny this conflict by asserting that "the construction given to *Garmon* by the Eighth Circuit [in *Platt*] does not differ significantly from that arrived at by other courts." Opp. 15. They are wrong.

The *Platt* court specifically held that "the critical inquiry for *Garmon* preemption purposes is 'whether the controversy presented to the state court is identical to . . . that which could

have been, *but was not*, presented to the Labor Board.'" 959 F.2d at 95 (quoting *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978) (emphasis added)). Respondents do not deny that their state-law wrongful-discharge claim cannot survive this inquiry, because they could have challenged their discharge by filing an unfair labor practice charge with the NLRB. Rather, respondents attempt to limit *Platt* to its facts, especially the fact that the plaintiff there had unsuccessfully sought relief from the NLRB before filing his lawsuit. *See* Opp. 16.

That fact, however, cannot be legally dispositive. As noted above, the *Platt* court itself described the "critical inquiry" as whether the dispute "'could have been, *but was not*'" presented to the NLRB. 959 F.2d at 95 (quoting *Sears*, 436 U.S. at 197 (emphasis added)). Were the law otherwise, the plaintiff could control whether a claim was preempted by the NLRA by simply declining to file an unfair labor practice charge with the NLRB and proceeding directly to court—a particularly perverse result, because it would *encourage* circumvention of the NLRB. Even more fundamentally, limiting *Garmon* preemption to cases where the plaintiff has filed a claim with the NLRB would in no way further the purpose of *Garmon* preemption, which is to ensure that claims implicating industrial relations are directed to the very administrative agency created by Congress to regulate industrial relations. *See, e.g., Garmon*, 359 U.S. at 242-43. The issue is not whether there is an *actual* conflict between a state-court lawsuit and an unsuccessful NLRB charge; rather, the issue is whether there is even a *potential* conflict between a state-court lawsuit and an NLRB charge such that a plaintiff can engage in forum-shopping. *See, e.g., id.* at 242 ("We have necessarily been concerned with the *potential* conflict of two law-enforcing authorities, with the disharmonies inherent in the two systems, one federal the other state, of inconsistent standards of substantive law and differing

remedial schemes.") (emphasis added). Accordingly, there is no basis in principle or precedent for limiting *Garmon* preemption to cases where the plaintiff has filed an unfair labor practice charge with the NLRB. *See, e.g., Lockridge*, 403 U.S. at 280 (state-law claim preempted under *Garmon* where plaintiff did not file any charges with the NLRB).

To be sure, the *Platt* court noted that "[t]he risk of interference with the Board's jurisdiction" is particularly acute where a plaintiff tries to recast an unsuccessful unfair labor practices charge as a state-law claim. 959 F.2d at 95. But that point has nothing to do with whether a lawsuit alleging wrongful discharge in retaliation for complaining about workplace safety (and, as here and in *Platt*, seeking *inter alia* reinstatement and backpay) involves "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. On the latter point, *Platt* recognized that "both the retaliatory misconduct alleged and the remedy sought are directly relevant to the Board's central function, unlike the cases in which a local interest exception has been recognized." 959 F.2d at 95 (citing *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63-64 (1966)).

In this critical respect, *Platt* is squarely inconsistent with *Paige*, *Inter-Modal*, and the decision below. *Platt* recognizes that the invocation of a state interest in workplace health and safety is insufficient to save from *Garmon* preemption a claim alleging wrongful discharge in retaliation for being (or supporting) a whistleblower on workplace-safety issues; the latter three cases hold the opposite. To say, as did the *Inter-Modal* court, that *Platt* "was limited to its facts," 73 Cal. App. 4th at 927, is thus disingenuous. Although *Platt* declined to decide "whether employee suits seeking redress for violation of state whistle-blower statutes are *generally* preempted under

Garmon," 959 F.2d at 95 (emphasis added), that is not the issue in this case. The issue in this case, and the issue that *Platt* decided, is whether *Garmon* preempts state-law *wrongful-discharge* suits where (as here and in *Platt*) "both the retaliatory misconduct alleged and the remedy sought are directly relevant to the Board's central function." *Id.* On this issue, the decision below is in direct conflict with *Platt*. Indeed, if anything, application of *Garmon*'s "local interest" exception is even *less* appropriate here (where the State of Washington does not even regulate workplace safety and health at this federal facility) than in *Platt* (where the Eighth Circuit conceded a "strong [state] interest in protecting workers who make job safety complaints," 959 F.2d at 95).* This Court's review is warranted to resolve this conflict, and to vindicate the supremacy of federal labor law by preventing state courts from usurping the NLRB's authority over industrial relations.

Finally, respondents suggest that petitioners did not preserve the *Garmon* preemption issue for this Court's review because petitioners "failed to raise this claim either in the state

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* Respondents inexplicably assert that "[p]etitioner has adduced no authority showing that persons employed by contractors at Hanford lack th[e] protections [of Washington State's health and safety laws], and respondents are aware of none." Opp. 17. But petitioners cited a Washington Supreme Court decision squarely holding that "the Legislature never intended for WISHA [the Washington Industrial Safety and Health Act] to apply to federal enclaves. The WISHA statute applies only to 'all work places within this state subject to the legislative jurisdiction of the state of Washington.'" *Department of Labor & Indus. v. Dirt & Aggregate, Inc.*, 837 P.2d 1018, 1023 (Wash. 1992) (citing Wash. Rev. Code § 49.17.230). Respondents tellingly do not deny that the Hanford nuclear facility is a federal facility governed by stringent *federal* health and safety standards, so that WISHA does not apply there either by its own terms, *see id.*, or as a matter of federal preemption, *see, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180-81 (1988); *Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 352-53 (2d Cir. 2002).

trial court, or in the federal district court below." Opp. 13. That suggestion is baseless. Petitioners did not raise the *Garmon* preemption issue in attempting to remove this case to federal court, because *Garmon* preemption (in sharp contrast to preemption under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185) does not provide an independent basis for federal jurisdiction. *Compare Hayden v. Reickerd*, 957 F.2d 1506, 1511-12 (9th Cir. 1991) *with Avco Corp. v. Machinists*, 390 U.S. 557, 560 (1968). And petitioners did not raise this issue in the state trial court because they moved successfully to compel arbitration, and this issue was not relevant to that motion. Petitioners properly raised the *Garmon* preemption issue in the Washington Court of Appeals as an alternative ground for affirming the trial court's dismissal of the case, and the Washington Court of Appeals specifically decided that issue. *See* Pet. App. 10a-12a. Under settled law, nothing further is necessary to present the issue for this Court's review. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002).

2. With respect to petitioners' motion to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, respondents do not deny the existence of a lower-court conflict on whether waivers of a judicial forum for individual claims in a collective bargaining agreement are subject to a presumption in *favor* of or *against* arbitration. As noted in the petition, the Fourth Circuit has held that such waivers are subject to the ordinary presumption in *favor* of arbitration, while eight other federal circuits (as well as the California Court of Appeal and the court below) have held that such waivers are either *per se* unenforceable or at least subject to a presumption *against* arbitration. *See* Pet. 16-17. Rather than addressing this conflict, respondents simply insist that this Court implicitly

resolved it in *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) by "articulat[ing] a general standard for the waiver of individual rights through a collective bargaining agreement." Opp. 19. Again, respondents are wrong.

The *Wright* court specifically *declined* to answer the question on which the lower courts are divided: "whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*." 525 U.S. at 80 (referring to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)). Indeed, that question was not even presented in *Wright*, because that case did not involve the FAA. *See* 525 U.S. at 77 n.1. As noted in the petition, *Wright* simply held that the presumption in favor of arbitration *under the LMRA* does not apply to federal statutory claims, because that presumption is based on the principle "that arbitrators are in a better position than courts *to interpret the terms of a CBA*." 525 U.S. at 78 (emphasis in original). That reasoning has no bearing on the presumption in favor of arbitration *under the FAA*, which applies to *all* arbitration agreements *regardless of their subject matter*, and which trumps any contrary state law or policy. It is not surprising, thus, that courts have continued to recognize the ongoing conflict between the Fourth Circuit and other courts even *after* the *Wright* decision. *See, e.g., Rogers v. NYU*, 220 F.3d 73, 75 (2d Cir. 2000) (*per curiam*); *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 481-86 (D.C. Cir.), *vacated*, 199 F.3d 487 (D.C. Cir. 1999) (*en banc*), *reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (*en banc*).

Respondents thus miss the point by insisting that "the Court of Appeals' finding that the CBA in this case failed to satisfy the *Wright* standard is unassailable." Opp. 19. The question here is whether the *Wright* standard is the right standard in this context in the first place. Respondents here agreed to be bound

by the collective bargaining agreement negotiated by their union *as a general matter*; it would be squarely inconsistent with the FAA to hold that they are bound by that agreement with respect to all matters *except* arbitration. Indeed, as this Court recently emphasized, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) (internal quotation omitted). If unions can negotiate with respect to their members' *substantive* rights without any problem, there is no reason why unions should be barred from negotiating with respect to their members' *procedural* right to a judicial forum.

Finally, this case presents an excellent vehicle to address the proper presumption with respect to arbitration in this context, because the presumption here is dispositive. Petitioners do not deny that the arbitration provision here does not satisfy the *Wright* standard, because that provision by its terms does not state that wrongful-discharge claims are subject to arbitration. *See Wright*, 525 U.S. at 79-82. By the same token, however, respondents do not deny that arbitration would be warranted here under the FAA's traditional presumption in *favor* of arbitration. To the contrary, respondents concede that the arbitration clause applies to disputes that "'arise out of the interpretation *or application* of this AGREEMENT,'" Opp. 8 (quoting Resp. App. 19a; emphasis added), and the Agreement in turn provides that "[e]mployees shall not be discharged for refusing to work in the above-described situations [involving potential health and safety violations]," Opp. 9 (quoting Resp. App. 18a; emphasis omitted). Applying a presumption in favor of arbitration, there can be no serious doubt that respondents' wrongful-discharge claim involves the "application" of the Agreement, and thus falls within the scope of the arbitration clause. Accordingly, this case turns on the proper presumption

to be applied in construing the arbitration provision, and allows this Court to resolve the "obviou[s] . . . tension" between its *Gardner-Denver* and *Gilmer* precedents, *Wright*, 525 U.S. at 76, and the resulting split of authority on a union's ability to waive its members' right to a judicial forum.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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